Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS, INC., ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the dormant commerce clause and dormant foreign commerce clause apply to Puerto Rico.

2. Whether the Federal Relations Act, which prohibits Puerto Rico from discriminating against mainland and foreign commerce, is violated by a Puerto Rico law that is protectionist in purpose and effect.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Supreme Court of the Commonwealth of Puerto Rico:

1. The Puerto Rican Association of Beer Importers, Inc.
2. Heineken Brouwerijen B.V.
3. V. Suárez & Co., Inc.
4. Méndez & Co., Inc.
5. B. Fernández & Hnos., Inc.
6. Ballester Hermanos, Inc.
7. Commonwealth of Puerto Rico.
8. Juan A. Flores Galarza, in his official capacity as Secretary of the Treasury.
9. Cervecería India, Inc.
10. CC1 Beer Distributors, Inc.

RULE 29.6 STATEMENT

The "Asociación de Importadores de Cerveza de Puerto Rico, Inc." hereinafter "APIC," is a non- profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation or subsidiaries or affiliates, nor is any of its stock publicly traded or owned by any publicly held company.

V. Suárez & Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

Méndez & Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

B. Fernández & Hermanos, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

Ballester Hermanos, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

RULE 29.6 STATEMENT – Continued

Heineken Brouwerijen B.V. is a corporation organized and existing under the laws of The Netherlands. It is a subsidiary of Heineken N.V., a corporation organized and existing under the laws of The Netherlands. Heineken Holding NV owns a 50.005% interest in Heineken N.V. The shares of both Heineken Holding N.V. and Heineken N.V. are listed and traded on Euronext Amsterdam and options of both shares are traded on Euronext.Liffe. L'Arche Green N.V., a company established in The Netherlands, owns a 58.78% interest in Heineken Holding N.V. Heineken N.V bonds are listed at the Luxembourg Stock Exchange.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. Factual Background	4
B. The Acts at Issue: Laws No. 69 and 108	8
C. Proceedings Below	13
REASONS FOR GRANTING THE PETITION	16
I. The Court Should Grant Review to Resolve a Conflict Over Whether the Dormant Commerce Clause Applies to Puerto Rico	16
A. The Federal Courts	17
B. The Puerto Rico Courts	21
C. The Legal Status of Puerto Rico Under This Court's Precedents Dictates The Conclusion That The Dormant Commerce Clause Applies	25
II. This Court's Review Is Required To Ensure Uniform Enforcement Of The Federal Relations Act, The Fundamental Law That Governs United States-Puerto Rico Relationships	30

TABLE OF CONTENTS – Continued

Page

III. This Court's Review Is Particularly Warranted Because This Court Affords The Only Federal Forum In Which Federal Claims Against Protectionist Puerto Rico Tax-Code Provisions Can Ever Be Heard 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984) 34

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 26, 31

Coors Brewing Co. v. Calderon, 225 F. Supp. 2d 22 (D. D.C. 2002) 36

Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36 (1st Cir. 1981) 28, 29

Cruz v. Melecio, 204 F.3d 14 (1st Cir. 2000) 26

Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) 18, 26, 27, 29, 31

Garcia v. Bauzá-Salas, 686 F. Supp. 965 (D. P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988) 23

Goya de P.R., Inc. v. Santiago, 59 F. Supp. 2d 274 (D. P. R. 1999) 19

Granholm v. Heald, 544 U.S. 460 (2004) 8

Hunt v. Wash. State Apple Adver. Comm., 432 U.S. 333 (1977) 34

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 16

Jusino Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34 (1st Cir. 2000) 27

Kraft General Foods v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992) 16

TABLE OF AUTHORITIES – Continued

Page

Lugo v. Suazo, 59 F.2d 386 (1st Cir. 1932) 32

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 34

Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 27

Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 26

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694 (1st Cir. 1983) 28

R.C.A. v. Gobierno de la Capital, 91 D.P.R. 416 (1964) 13, 21, 22, 24

Rodriguez v. Popular Democratic Par v, 457 U.S. 1 (1982) 27

Rodriguez v. Puerto Rico Fed. Affairs Admin., 435 F.3d 378 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 347 (2006) 27

San Juan Trading Co. v. Sancho, 114 F.2d 969 (1st Cir. 1940), *cert. denied*, 312 U.S. 702 (1941) 19, 31, 32

Sancho v. Corona Brewing Corp., 89 F.2d 479 (1st Cir.), *cert. denied*, 302 U.S. 699 (1937) 32

Sea-Land Servs. v. Municipality of San Juan, 505 F. Supp. 533 (D. P.R. 1980) 23

Starlight Sugar Inc. v. Soto, 909 F. Supp. 853 (D. P.R. 1995) 18

Starlight Sugar Inc. v. Soto, 114 F.3d 330 (1st Cir. 1997) 18, 19

TABLE OF AUTHORITIES – Continued

Page

Starlight Sugar Inc. v. Soto, 253 F.3d 137 (1st Cir.), *cert. denied*, 534 U.S. 1021 (2001) 22, 23

Torres v. Puerto Rico, 442 U.S. 465 (1979) 27

Trailer Marine Transport Corp. v. Vazquez, 977 F.2d 1 (1st Cir. 1992) 17, 18, 19, 22

United Egg Producers v. Dep't of Agric., 77 F.3d 567 (1st Cir. 1996) 18

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007) 34

United States v. Lopez Andino, 831 F.2d 1164 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988) 28

United States v. Sanchez, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 28

United States Brewers Ass'n v. Perez, 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) 35

United States Brewers Ass'n v. Perez, 455 F. Supp. 1159 (D. P.R. 1978) 35, 37

United States Brewers Ass'n v. Perez, 109 D.P.R. 456 (1980) 8, 35

Used Tire Intern., Inc. v. Diaz-Saldana, 155 F.3d 1 (1st Cir. 1998) 19

U.S.I. Properties Corp. v. M.D. Constr. Co., 230 F.3d 489 (1st Cir. 2000) 28

Wackenhut Corp v. Aponte, 386 U.S. 268 (1967) 26

TABLE OF AUTHORITIES – Continued

Page

Wal-Mart Stores Inc. v. Rodriguez, 238 F. Supp.2d 395 (D. P.R. 2002), *vacated as moot*, 322 F.3d 747 (1st Cir. 2003) 20

Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005), *cert. denied*, 546 U.S. 1131 (2006) 18

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 4

STATUTES AND REGULATIONS

28 U.S.C. § 1341 35

28 U.S.C. § 1343(3) 27

28 U.S.C. § 2281 26

48 U.S.C. § 741a 30

48 U.S.C. § 872 35

Pub. L. No. 81-600, 64 Stat. 319 (1952) 31

Pub. L. No. 89-571, 80 Stat. 764 (1966) 28

39 Stat. c. 145, p.951 *et seq.* (1917) 31

13 L.P.R.A. § 6001 *et seq.* 6

13 L.P.R.A. § 6006 4

13 L.P.R.A. § 6912a 5, 6, 7

Treasury Regulation No. 1894 of March 10, 1975 5

Treasury Regulation No. 3134 of August 2, 1984 5

Treasury Regulation No. 4745 of July 30, 1992 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

El Nuevo Dia, June 4, 2002 11

House Bill 2244, 14th Legis. Ass., 3rd Ord. Sess. (March 1, 2002) 8

Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244 (April 23, 2002) 9, 10

Joint Resolutions of the House of Representatives and Senate No. 6 of July 7, 1971 4

Proceedings of the House of Representatives (May 2, 2002) 10

Resolution of the House of Representatives No. 15 of April 24, 1972 4

PETITION FOR A WRIT OF CERTIORARI

Petitioners are Heineken Brouwerijen B.V. and the Asociación Puertorriqueña de Importadores de Cerveza, Inc. (Puerto Rican Association of Beer Importers or APIC), a non-profit Puerto Rico corporation whose members include the exclusive distributors in Puerto Rico for Coors Light, Miller Genuine Draft, Miller Draft, Heineken, Amstel Light, Bass Ale, Budweiser, Bud Light, Samuel Adams, Corona, and other beers. The local distributors of these beers are also, individually, petitioners. Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico.

OPINIONS BELOW

The judgment of the Supreme Court of Puerto Rico is reported at 2007 TSPR 92 and is reprinted at App. 1-60. The opinions of the Court of First Instance and the Court of Appeals are unreported and are reprinted at App. 61-97.

JURISDICTION

The Supreme Court of Puerto Rico issued its decision on May 16, 2007. Petitioners' timely petition for rehearing was denied by order officially notified

and recorded on September 4, 2007. App. at 128. This Court has jurisdiction under 28 U.S.C. § 1258.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions and statutes are set forth at App. 131-46.

INTRODUCTION

This case presents a conflict between the federal courts and the Supreme Court of Puerto Rico over whether the dormant commerce clause applies to Puerto Rico. Every federal court to consider that question, including the First Circuit (the Court of Appeals with the most experience in legal issues concerning Puerto Rico), has held that the clause applies. The federal courts have struck down numerous Puerto Rican laws and regulations as unconstitutionally protectionist. In direct conflict, the Puerto Rico Supreme Court holds that the dormant commerce clause does not apply to Puerto Rico. That court has never held any law or regulation of Puerto Rico to violate the clause. Indeed, in this very case, a justice of that court chastised the First Circuit for having the "audacity to intrude" by holding, as the First Circuit repeatedly has, that the dormant commerce clause does constrain Puerto Rico.

The fundamental legal structure of the United States-Puerto Rico economic relationship is also governed by the Federal Relations Act (FRA). That Act further prohibits Puerto Rico from discriminating between goods imported from the United States or foreign countries and goods produced in Puerto Rico. But just as the Puerto Rico Supreme Court rejects the dormant commerce clause's application to Puerto Rico, and has never held a law or regulation of Puerto Rico to violate the clause, that court has also never held any action of the Puerto Rican government to violate the FRA.

The Puerto Rico courts dismissed petitioners' complaint at the pleading stage. There was no discovery and no evidentiary hearing. The federal legal issues are thus cleanly and squarely presented. In addition, this Court is the only federal forum in which petitioners' federal claims can be heard, because the Tax Injunction Act and Butler Act preclude jurisdiction in the lower federal courts over actions challenging protectionist provisions in Puerto Rico's tax code. For these reasons, this Court's intervention is required to resolve the conflict over application of the dormant commerce clause to Puerto Rico and to clarify the constitutional and statutory structure of the economic relationship between the United States and Puerto Rico.

STATEMENT OF THE CASE

A. Factual Background

Local producers in Puerto Rico enjoyed a virtual monopoly on the Puerto Rico beer market until the 1960s, when they began to face competition from imported beer, primarily beer imported from the mainland. Since the moment that competition began, Puerto Rico has adopted one measure after another to protect local producers from this competition. These measures initially included direct subsidies; then, when these subsidies proved insufficient or too costly, protectionist administrative regulations, which the government was forced to modify through federal court litigation; and finally, the differential taxation scheme at issue in this case. That scheme discriminates against mainland and foreign producers and has dramatically distorted the beer market in favor of Puerto Rico's one local producer of beer.

From 1971-73, Puerto Rico sought to protect local beer producers through the arguably constitutional means of approximately eight million dollars in direct economic subsidies.[1] When that failed or

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[1] *See* General Program of Aid and Promotion of the Beer Industry ("the Programa") and Joint Resolutions of the House of Representatives and Senate No. 6 of July 7, 1971 and Resolution of the House of Representatives No. 15 of April 24, 1972. At the same time, Puerto Rico increased taxes on beer by 40%, Act No. 7 of July 2, 1971, 13 L.P.R.A. § 6006, so that the Programa subsidies were part of a taxation-subsidization scheme whose net effect was to offset the new, higher taxes for local beer producers. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186

(Continued on following page)

was unsustainable, the Secretary of Treasury issued regulations that controlled the packaging, bottling, size, shape, color, and glass engraving of bottled beer. Treasury Regulation No. 1894 of March 10, 1975 and No. 3134 of August 2, 1984. These regulations effectively required all importers to make specially produced bottles only for Puerto Rico if they wanted to sell there. As a result, sixteen off-island brands abandoned the Puerto Rico market in one year. Complaint, at ¶30; App. at 227. As soon as these regulations were challenged in federal court as non-tariff trade barriers that violated the dormant commerce clause, the Puerto Rico Secretary of Treasury agreed to modify them (the Butler and Tax Injunction Acts permit federal court challenges to protectionist regulations, but not to tax provisions).[2] At the same time, Puerto Rico also enacted a protectionist scheme of differential excise taxation, at issue here.

The structure of this scheme was originally established in Act No. 37, enacted in 1978. 13 L.P.R.A. § 6912a (July 13, 1978). This Act imposed an excise tax of $1.60 per gallon of beer produced, but created a special "exemption" for brewers whose total

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(1994) (holding dormant commerce clause violated when local subsidies are coupled with non-discriminatory taxes).

[2] These regulations have subsequently been amended but continue to include restrictions unfavorable to the importation of beer, such as a requirement that beer be sold in non-standard size cans. *See* Treasury Regulation No. 4745 of July 30, 1992.

worldwide production did not exceed 31 million gallons per year. Below this volume, producers paid only $1.05 per gallon. No Puerto Rico beer producer, then or now, has ever produced over 31 million gallons annually. In contrast, nearly all off-island producers who distribute beer in Puerto Rico produce more than this amount. Under Act No. 37, "larger producers" – i.e., mainland and foreign producers – thus paid a 52% higher tax than smaller producers – i.e., local producers. Before creating this differential tax scheme, Puerto Rico had first imposed in 1969 an excise tax on beer that equally taxed all beer, whether produced in Puerto Rico or imported. 13 L.P.R.A. § 6001 *et seq.*

In an extensive analysis of Act No. 37, the Superior Court of Puerto Rico made no pretense about the fact that the Act was adopted to protect the two local beer producers then existing in Puerto Rico against economic competition from mainland and foreign producers. Nonetheless, the court concluded that nothing in federal law or the Constitution precluded Puerto Rico from doing so.

Thus, that court found that Puerto Rico's government had taken measures to "address the crisis the local beer industry was going through when it was being gradually displaced by foreign beer." App. at 183. Referring repeatedly to the need to "remedy the situation of the Puerto Rican beer industry," the court noted the direct and indirect local employment benefits of "our industry" in beer production; the court found, for example, that "[i]t is estimated that

for each employment generated in the beer industry an additional employment is created in different sectors such as services, commerce and Government, among others." App. at 182. Indeed, Act No. 37 further required that producers favored by the lower tax rate agree to maintain their employment at the same level or higher as that which had prevailed on May 31, 1978. App. at 179.

The court concluded that the purely protectionist purpose of Act. No. 37 nonetheless was legitimate:

> We consider that the purpose which inspired the Act is legitimate; the wish to try to protect and achieve the welfare of an industry that is going through a critical situation. This Act not only attempts to protect the local beer industry but that jointly serves as a protectionist mechanism to other industries and the public treasury. App. at 186.

As the court further explained:

> The yearly production and consumption of each of our two (2) breweries show that economically they cannot subsist without help. The Legislative Assembly had before its consideration documents and information about the present state of the local beer industry. The crisis this industry is going through induced the Legislature to approve [the differential beer tax], being evident the desire to create a protectionist mechanism for local breweries. App. at 188.

The court concluded: "To try to help a local industry is not synonymous of discrimination."[3] App. at 188. The Supreme Court of Puerto Rico (three Justices recusing) affirmed. *U.S. Brewers Ass'n v. Secretary of the Treasury of the Commonwealth of Puerto Rico*, 109 D.P.R. 456 (1980), 1980 WL 138574 (P.R. Feb. 29, 1980).

B. The Acts at Issue: Laws No. 69 and 108

By 2002, only one Puerto Rican beer producer, Cervecería India (CI), remained. By early 2002, it enjoyed a $0.55 per gallon tax advantage over mainland and foreign competitors.[4] Then, in March 2002, in response to large budget deficits, the legislature proposed increasing the excise tax for all producers by 78%. *See* House Bill 2244, 14th Legis. Ass., 3d Ord. Sess. (March 1, 2002). The ensuing legislative process was dominated by efforts, ultimately successful, to modify this proposal in order to ensure even further economic protection for the remaining local beer producer.

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[3] The court buttressed its conclusion by holding that the Twenty-first Amendment, which it found applicable to Puerto Rico, specifically permitted this kind of protectionism with respect to alcoholic beverages. App. at 211. Of course, this Court has since rejected the basis for that conclusion. *Granholm v. Heald*, 544 U.S. 460 (2004).

[4] The excise tax had grown to $2.70 per gallon for producers of more than 31 million gallons a year worldwide and $2.15 for CI, which has never produced this amount.

Typical was the committee testimony of the Mayor of Mayaguez, where CI is located: "The proposed excise tax which affects and could affect our local Cervecería India, would represent not only a loss of the only domestic beer producer, but worse, a fatal blow to the economy of the entire western region of Puerto Rico, which can not withstand the loss of a single job more." Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244, at 3 (April 23, 2002).[5] No witnesses representing small breweries other than CI appeared, presented testimony, or filed prepared statements; no legislator made any statement supporting any named small brewer other than CI.

As enacted, Law No. 69 reflected major amendments that transformed the originally proposed flat increase of 78% for all producers of beer into a gerrymandered scheme whose purpose and effect was to provide even further protectionist assistance to CI. As enacted, Law No. 69 has the aim and effect of using the tax code to provide even greater competitive advantages to CI as against its mainland and foreign competitors. Little about this design was obscured during the legislative process, in part because many legislators appear not to believe the dormant commerce clause binds Puerto Rico. Thus, for example, when the Chairman of the House Treasury Committee presented the reported bill to the full House, he noted that the bill "also contains an amendment aimed to

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[5] The page numbers regarding the legislative proceedings are from a certified English translation of the legislative history, which petitioners will provide to the Court if requested.

maintain the protection of Cervecería India based on its production." Proceedings of the House of Representatives 14 (May 2, 2002). Similarly, the Speaker of the House explained on the floor: "[W]e are determined to help the Puerto Rican beer industry, in this case Cervecería India. It is the last bastion of the Puerto Rican beer industry." Statement of Rep. Carlos Vizcarronado Irizarry. *Id.* at 79-80. Members of the Puerto Rico House made floor statements such as, "I am all for discrimination in favor of Puerto Rican businesses, I want to be clear." Statement of Rep. Silva, Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244, at 184 (April 23, 2002).

As written, Law No. 69 appears to be non-discriminatory. But Law No. 69 raised the tax on "large" producers by 50% while not increasing the tax on CI at all. Thus, distributors for large producers – i.e., mainland and foreign producers – began to pay an 88% higher excise tax than did the local producer, CI ($4.05 per gallon compared to $2.15 per gallon). The formal structure of Law No. 69 is a graduated tax system tied to production volume:

Gallon Range	Tax Per Gallon
0 to 9 million	$2.15
9 to 10 million	$2.36
10 to 11 million	$2.57
11 to 12 million	$2.78
12 to 31 million	$2.99
Over 31 million	$4.05

When Law No. 69 was enacted, CI produced 4.6 million gallons a year and was taxed at the lowest rate.

Law No. 69 took effect on June 14, 2002. Its effect on the market was immediate and dramatic, given the price sensitivity of the market for beer. Between FY 2002 and 2003, the market share of the one local producer, CI, more than doubled, from 7.1% to 17.6% of the market. Over time, the economic effects of this differential tax scheme continued to increase; from FY 2002 to 2006, the market share of imported beer fell from 92.9% to 74.1%. In that same period, CI's market share rose, accordingly, from 7.1% to 25.9%.[6]

CI also publicly proclaimed that it had pledged to the Puerto Rico legislature, as a quid pro quo for the legislature not raising the tax on "small" producers – i.e., on CI – that CI would not raise the retail price of its beer. Thus, a mere five days after Law No. 69 was enacted, CI took out full-page advertisements in a major local newspaper proclaiming that it had made a "commitment with the Legislature" not to raise its retail beer price in return for the economic protection that Law No. 69 gave it. *See* El Nuevo Dia, June 4, 2002.

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[6] In the Puerto Rico courts, petitioners submitted an offer of proof and an affidavit from an expert economist, Dr. Jorge F. Freyre, documenting the effects of Laws 69 and 108 on the beer market. Should the Court require a certified English translation of this offer of proof, petitioners will provide one.

As CI's market share and production soared due to the first phase of this protectionist regime, the Puerto Rico legislature then enacted yet another measure to take this scheme to a further level. As a result of the competitive advantage Law No. 69 gave CI, its production volume more than doubled within a year to over 10.4 million gallons. Puerto Rico's Secretary of the Treasury then publicly indicated that, as he interpreted Act No. 69, CI was obliged to pay for each gallon it produced at the tax rate determined by its total annual production. Thus, if CI produced 10.4 million gallons, it would pay at the rate of $2.57 per gallon for each and every gallon of that production.

At this point, in response to further complaints from CI, the Puerto Rico legislature again intervened. It now enacted Law No. 108, May 6, 2004, which provides that any producer of less than 31 million gallons in a year – i.e., CI – will not be taxed based on its total volume of production. Instead, CI is to pay only $2.15 per gallon on its first 9 million gallons, even if it produces considerably more than that; $2.36 on its next million gallons produced; $2.57 on the next million, and so on. Put in other terms, distributors for large off-island producers must pay $4.05 per gallon for each and every gallon they produce; but CI will always pay only $2.15 for the first 9 million gallons it produces, except in the unlikely event its production comes to exceed 31 million gallons. Distributors for off-island producers thus pay nearly twice the tax for those same first 9 million gallons of production.

Every producer subject to the full, flat tax of $4.05 per gallon is a mainland or foreign producer, while virtually the only producer who benefits from the "special" rate of $2.15 per gallon is the local producer, CI. App. at 234.

C. Proceedings Below

Petitioners filed a complaint in the Puerto Rico courts seeking declaratory and injunctive relief against enforcement of Law No. 69 on the grounds that it violated the dormant commerce clause, the Federal Relations Act, and the dormant foreign commerce clause. The Puerto Rico trial court, the Court of First Instance (Superior Court, San Juan Part) dismissed petitioner's claims at the pleading stage, without any discovery.

That court did so on the ground, in part, that the Puerto Rico Supreme Court had long held that the dormant commerce clause does not apply to Puerto Rico. As the court of first instance held, "[t]he doctrine of *stare decisis* previously discussed also disposes of the claims as to the commerce clause of the federal Constitution, since our Supreme Court, in the case of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), decided that the federal commerce clause does not apply to Puerto Rico. . . ." App. at 111. The Court of Appeals affirmed. App. at 88.

Upon a petition for certiorari, the Puerto Rico Supreme Court also affirmed, 4-0, in a single sentence that did not state any reasons.[7] One concurring Justice, Justice Fuster Berlingeri, wrote a seventeen-page opinion focused solely on making clear that the dormant commerce clause does not apply to Puerto Rico. First, Justice Fuster noted – just as the trial court had noted – that the Puerto Rico Supreme Court had several times rejected the claim that the dormant commerce clause applies to Puerto Rico. As he put it, the Puerto Rico Supreme Court had "very deliberately resolved" numerous times that "*the so called 'dormant' aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*" App. at 5 (emphasis in original). He cited several decisions of the Puerto Rico Supreme Court that have so held.

Second, Justice Fuster attacked the federal courts for having held instead that the dormant commerce clause does apply to Puerto Rico. He went on to "vehemently denounce" the unanimous conclusion of every federal court, including the First Circuit, that the clause does apply. As part of the justification for his court's decision not to apply the dormant commerce clause to Puerto Rico, he argued that Puerto Rico needs to be able to engage in economic protectionism in order "to successfully manage the

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[7] One Justice recused herself and another Justice did not participate.

serious financial problems of Puerto Rico," and he characterized as no more than "judicial whim" decisions of the First Circuit holding that the Constitution denies Puerto Rico this power.

Indeed, Justice Fuster criticized the First Circuit for having "had the audacity" to hold that the dormant commerce clause applies. He noted, correctly, that the United States Supreme Court has never directly addressed the issue. He also asserted that this Court's previous decisions addressing Puerto Rico's legal status under the Constitution and federal statutes were flatly inconsistent with holding that the dormant commerce clause applies. He condemned the First Circuit's contrary conclusion as "based on a very limited and superficial analysis." Finally, he characterized the unanimous position of the federal courts that the dormant commerce clause does apply as "a clearly inappropriate intervention" in a matter "that lies beyond [their] authority," based on his view that this Court's precedents do not support application of the clause to Puerto Rico.

Justice Rebollo Lopez wrote a lengthy concurring opinion which concluded that the dormant commerce clause *does* apply to Puerto Rico. The other two Justices stated no reasons for their affirmance. As noted above, the Puerto Rico Supreme Court has never found any Puerto Rico legislation or regulation challenged as protectionist to violate either the dormant commerce clause or the Federal Relations Act.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Resolve a Conflict Over Whether the Dormant Commerce Clause Applies to Puerto Rico

The question whether the dormant commerce clause applies to Puerto Rico is fundamental to the legal relationship between Puerto Rico and the United States. If the United States and Puerto Rico are part of an integrated economic system for constitutional purposes, Puerto Rico, like the States, is prohibited from enacting trade barriers that are protectionist in purpose, structure, and effect. Yet on this most fundamental constitutional question, the federal courts and the Puerto Rico Supreme Court are directly in conflict.[8]

The conflict on that question alone warrants this Court's review. But the significance of this conflict goes beyond the immediate issue of the dormant commerce clause. It has radiating effects on related

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[8] Petitioners' First Question presented includes whether the dormant foreign commerce clause, see *Kraft General Foods v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71 (1992), applies to Puerto Rico. Because the same arguments and facts apply in this case regarding both the dormant commerce clause and dormant foreign commerce clause claims, the arguments regarding the former are meant to apply to the latter as well. The dormant foreign commerce clause, of course, is more restrictive of state power than its domestic counterpart. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979).

legal questions, such as ones of qualified immunity and res judicata. In the face of the ongoing conflict between the federal and Puerto Rico courts on the dormant commerce clause, the federal courts cannot apply personal immunity and res judicata doctrines in the normal fashion. As detailed below, the federal courts have had to deform these doctrines to deal with the fact that the federal courts and the Puerto Rico Supreme Court are in conflict over application of the dormant commerce clause to Puerto Rico.

Even in the absence of the direct conflict at issue in this case, this Court has acted numerous times to clarify issues concerning Puerto Rico's legal status in the federal system. *See infra* at IC. Given the importance of the question whether the dormant commerce clause applies, the fact of a conflict between the First Circuit and the Puerto Rico Supreme Court, and the ancillary legal issues that this unresolved conflict affects, this Court's review to resolve this conflict and clarify whether the dormant commerce clause applies to Puerto Rico is warranted.

A. The Federal Courts

Every federal court to consider the question has concluded that the dormant commerce clause applies to Puerto Rico. As Judge Boudin put it in *Trailer Marine Transport Corp. v. Vazquez*, 977 F.2d 1 (1st Cir. 1992), the leading case on the issue, the rationale for the dormant commerce clause doctrine – "to foster economic integration and prevent local interference

with the flow" of commerce – "applies with equal force to official actions of Puerto Rico. Full economic integration is as important to Puerto Rico as to any state in the Union." *Id.* at 8. In reaching this conclusion, the First Circuit relied centrally on this Court's analysis that "the purpose of Congress in [the 1950s legislation that created the modern Commonwealth of Puerto Rico] was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." *Examining Board v. Flores de Otero*, 426 U.S. 572, 594 (1976).

Indeed, Puerto Rico, with a more state-centered[9] and state-managed economy, has often enacted blatantly protectionist legislation. Until recently, for example, Puerto Rico law required all pharmacies seeking to open or relocate within Puerto Rico to obtain a certificate of necessity and convenience. *See Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005) (holding this law to violate the dormant commerce clause), *cert. denied*, 546 U.S. 1131 (2006). Puerto Rico agriculture regulations required imported eggs to be stamped with a two-letter postal code for their state of origin. *See United Egg Producers v. Dep't of Agric.*, 77 F.3d 567, 569 (1st Cir. 1996) (holding these

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[9] For example, when economic competition drove the private sector out of the sugar-production industry, the Commonwealth government established the government-owned Sugar Corporation of Puerto Rico in response. *Starlight Sugar Inc. v. Soto*, 909 F. Supp. 853, 855-56 (D. P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997).

regulations unconstitutional). In *Trailer Marine* itself, the First Circuit invalidated a Puerto Rico law that permitted special premiums to be assessed on van trailer vehicles engaged in maritime transportation. *See also Used Tire Intern., Inc. v. Diaz-Saldana*, 155 F.3d 1 (1st Cir. 1998) (holding unconstitutional as facially discriminatory against interstate commerce Puerto Rico law regulating imported used tires).[10]

The federal district courts in Puerto Rico have similarly found numerous, recent instances of classic dormant commerce clause violations. *See, e.g., Starlight Sugar Inc. v. Soto,* 909 F. Supp. 853 (D. P.R. 1995), *aff'd,* 114 F.3d 330 (1st Cir. 1997) (holding that dormant commerce violated by regulations prohibiting sugar from being shipped to Puerto Rico in bulk and instead requiring sugar to be packaged in two- and five-pound bags before arrival in Puerto Rico); *Goya de P.R., Inc. v. Santiago*, 59 F. Supp. 2d 274, 276-78 (D. P.R. 1999) (clause violated by regulations that required inspection on imported pigeon peas but not locally-produced ones). Indeed, in one case, the Puerto Rico Department of Justice, in settling an

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[10] Before the First Circuit recognized that the dormant commerce clause applied, it invalidated as protectionist Puerto Rico taxes that differentiated between round matches (locally produced) and square matches (mainland and foreign produced), as well as licensing and tax provisions on coffee that favored Puerto Rico producers. These provisions were invalidated under the Federal Relations Act. *See San Juan Trading Co. v. Sancho*, 114 F.2d 969, 974-75 (1st Cir. 1940), *cert. denied*, 312 U.S. 702 (1941); *Lugo v. Suazo*, 59 F.2d 386, 389 (1st Cir. 1932).

antitrust claim, forced Wal-Mart to adopt purchasing and employment practices that favored Puerto Rico businesses. *See Wal-Mart Stores Inc. v. Rodriguez*, 238 F. Supp. 2d 395, 414-15 (D. P.R. 2002), *vacated as moot*, 322 F.3d 747 (1st Cir. 2003). The federal court issued a preliminary injunction that enjoined the Puerto Rico Department of Justice from pursuing this antitrust claim, after the court found the antitrust claim to be retaliation meant to coerce Wal-Mart into accepting conditions that would otherwise violate the dormant commerce clause. As the federal district court put it, the Puerto Rico Department of Justice was "engaging in state protectionism prohibited by the federal constitution." *Id.* at 416.

With respect to the beer market, the Puerto Rico Treasury Department, as noted above, promulgated regulations that required beer bottles to be embossed (i.e., the slogans had to be raised on the glass surface of the bottle, rather than being produced on a printed label) with the slogans "Proteja el Ambiente" (Protect the Environment) and "No la Tire" (Don't Throw Out). App. at 259. These regulations further required all bottles to be amber colored. The effect of these regulations, which led sixteen off-island manufacturers to abandon the market within a year, was to require special bottles to be produced only for the Puerto Rico market and to undermine the brand recognition of off-island producers, such as Heineken, whose product was associated with bottles of distinctive color.

These cases and history not only establish that the federal courts uniformly hold that Puerto Rico is

bound by the dormant commerce clause. They also document that Puerto Rico has a long record of economically protectionist action against mainland and foreign competition. At every level of the Puerto Rican government – the legislature, the administrative agencies, the Department of Justice – there is resistance to the fundamental constitutional principle that the dormant commerce clause constrains Puerto Rico. That resistance is further encouraged and validated by the judicial branch of Puerto Rico, as we now show.

B. The Puerto Rico Courts

The Puerto Rico Supreme Court maintains that the dormant commerce clause does not apply to Puerto Rico. The holding of the Puerto Rico Supreme Court on this issue was first stated in *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416, 418 (1964) and continues to be the controlling view:

> [T]he constitutional provision which reserves to Congress the power to regulate commerce with foreign nations, between the states and with the Indian tribes, has not only not governed, nor governs, by its own force in Puerto Rico. . . .

Both the federal courts and the Puerto Rico courts recognize that this is the position of the Puerto Rico Supreme Court. Thus, writing for the First Circuit, Judge Torruella noted that *R.C.A. v. Gobierno de la Capital* established that the Puerto Rico

Supreme Court "took a different view" of the applicability of the dormant commerce clause to that of the First Circuit in the seminal *Trailer Marine* case, *supra*. *See Starlight Sugar Inc. v. Soto*, 253 F.3d 137, 144 (1st Cir.), *cert. denied,* 534 U.S. 1021 (2001). The First Circuit concluded that in the same situation in which a state would be found in violation of the clause, the Puerto Rico Supreme Court would not find Puerto Rico to be in violation. *Id.* at 143. As the Puerto Rico Supreme Court itself said in *R.C.A.*, the Commonwealth may exercise its taxing power in a manner that "would not be permissible to a state covered by the provisions of the Federal Constitution." 91 D.P.R. at 419.

Starlight Sugar involved a blatantly protectionist administrative regulation that the First Circuit found unconstitutional. Nonetheless, given the First Circuit's recognition that the Puerto Rico courts hold the dormant commerce clause inapplicable, the First Circuit held that the official who promulgated this protectionist regulation was immune to suit in his personal capacity. The First Circuit concluded that this federal-local judicial conflict made it impossible to hold it "clearly established" that the dormant commerce clause applies to Puerto Rico. Even though the applicability of the clause to Puerto Rico *is* clearly established law in the First Circuit, it is not in the Puerto Rico Supreme Court. Hence, the First Circuit was required to conclude that personal immunity still attaches even when governmental actors undertake

blatantly protectionist action. *Starlight Sugar,* 253 F.3d at 145.

Similarly, the federal district court in Puerto Rico has recognized that, "under Puerto Rican law, as exposed by the Puerto Rico Supreme Court, the [dormant commerce] clause is inapplicable to the Island." *Garcia v. Bauzá-Salas*, 686 F. Supp. 965, 967 (D. P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988) (holding Anti-Injunction Act barred District Court injunction). After the Puerto Rico courts, including the Supreme Court, rejected a business owner's equal protection and due process challenges to an economic regulation, the federal district court permitted him to challenge the same regulation under the dormant commerce clause. The federal court held that res judicata could not bar the dormant commerce clause claim because the Puerto Rico Supreme Court rejects the dormant commerce clause altogether. On the merits, the district court went on to hold the regulation to be protectionist and unconstitutional. *Id. See also Sea-Land Services v. Municipality of San Juan*, 505 F. Supp. 533, 542 (D. P.R. 1980) (holding that "we must disagree with the holding of [the Puerto Rico Supreme Court in] *RCA*" and concluding that dormant commerce and foreign commerce clauses apply to Puerto Rico).

The local courts also expressly recognize that the Puerto Rico Supreme Court holds the dormant commerce clause inapplicable to Puerto Rico. As the trial court in this case stated, *stare decisis* bound that court to reject petitioners' dormant commerce claims

because "our Supreme Court, in the case of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), decided that the federal commerce clause does not apply to Puerto Rico. . . ." App. at 111. Also in this case, Justice Fuster of the Puerto Rico Supreme Court made clear that the Puerto Rico Supreme Court had several times rejected the claim that the dormant commerce clause applies to Puerto Rico. As he put it, the Puerto Rico Supreme Court had "very deliberately resolved" numerous times that "*the so called 'dormant' aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*" App. at 5 (emphasis in original). Moreover, the Puerto Rico Supreme Court has never, as far as petitioners are aware, held *any* Puerto Rico law, regulation, or act to be illegal protectionism under either the dormant commerce clause or the FRA.

Nonetheless, in an apparent effort to evade this Court's review, the Puerto Rico Supreme Court in recent years has cagily avoided expressly stating yet again that the dormant commerce clause does not apply. In this case, that court affirmed the lower court, 4-0, in a single sentence that stated no reasons for its decision. The court refused to explain its decision despite the fact that two of the four Justices wrote lengthy, diametrically opposed, concurring opinions on just this issue. The issue of whether the dormant commerce clause applies to Puerto Rico was obviously central to the case and squarely presented. For many years, the federal courts have made clear their understanding that the Puerto Rico Supreme

Court does not recognize the dormant commerce clause's applicability to Puerto Rico – yet the Puerto Rico Supreme Court has said nothing to contradict that understanding.

No case will present this issue more directly than this one. This case involves one of the most significant dormant commerce clause challenges to a law of Puerto Rico that the Puerto Rico Supreme Court has addressed. For over 25 years, the protectionist purpose and effect of the "special exemption" from excise taxes for "small" beer manufacturers – i.e., CI – has been an open and notorious secret in Puerto Rico. The federal courts cannot be turned to for an adjudication of this federal claim, because the Butler Act and Tax Injunction Act preclude federal jurisdiction. *See infra* at III. The amount at stake is substantial: since 2002, CI has paid approximately $100 million less in taxes than if Puerto Rico had taxed local producers at the same rate as off-island producers.[11]

C. The Legal Status of Puerto Rico Under This Court's Precedents Dictates The Conclusion That The Dormant Commerce Clause Applies

On the merits, the federal courts' conclusion that the dormant commerce clause applies to Puerto Rico is the only result consistent with this Court's precedents concerning the legal status of Puerto Rico. The

[11] *See supra* note 6.

contrary position of the Puerto Rico Supreme Court is at odds with these precedents and the more general case law that defines Puerto Rico's legal status.

As this Court has recognized many times, the purpose of Congress in creating the Commonwealth of Puerto Rico, through legislation in 1950 and 1952, "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." *Examining Board*, 426 U.S. at 594. Thus, this Court and the lower federal courts accord Puerto Rico the same immunities, powers, and dignity under numerous federal doctrines and statutes as those of the States. After Puerto Rico became a Commonwealth, this Court held that it should be treated as a state for purposes of the three-judge court act, 28 U.S.C. § 2281. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *see also Wackenhut Corp v. Aponte*, 386 U.S. 268 (1967) (summarily affirming district court decision that required abstention regarding interpretation of Puerto Rico law); *Cruz v. Melecio,* 204 F.3d 14, 25 (1st Cir. 2000) (requiring abstention). This Court applies the same test for federal preemption of a law of Puerto Rico under the Supremacy Clause as it does for pre-emption of the law of a State. *P.R. Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

Just as Puerto Rico benefits from being treated as a State in cases such as these, this Court has also recognized that Puerto Rico operates under similar constitutional and federal statutory constraints as

the States. This Court has held that the First Amendment free speech clause, the Fourth Amendment, the Due Process clause (of either the Fifth or Fourteenth Amendments), and the Equal Protection clause (of either the Fifth or Fourteenth Amendments), apply directly to Puerto Rico of their own force. *See generally Posadas De P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 328 n.1 (1986); *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Similarly, "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). This Court has also held that Puerto Rico is a "State" for purposes of the jurisdictional provision in 28 U.S.C. § 1343(3), which grants federal jurisdiction for federal civil-rights claims alleging deprivation under "color of any State law." *Examining Board*, 426 U.S. at 597. In that case, the Court went on to hold unconstitutional a Puerto Rico law that permitted only United States citizens to obtain licenses to practice civil engineering.

Consistent with this Court's decisions, the courts of appeals have treated Puerto Rico as legally equivalent to a state in numerous contexts touching on the powers and duties of state sovereignty. Like the states, Puerto Rico is immune in the federal courts from damages suits under the Fair Labor Standards Act. *Rodriguez v. P.R. Federal Affairs Administration*, 435 F.3d 378 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 347 (2006); *Jusino Mercado v. Commonwealth of P.R.*, 214

F.3d 34 (1st Cir. 2000). The First Circuit has held also that the Commonwealth enjoys Eleventh Amendment immunity from suit in federal court. *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983). Puerto Rico, like the states, is not subject to the diversity jurisdiction statute. *U.S.I. Properties Corp. v. M.D. Construction Co.*, 230 F.3d 489, 499 (1st Cir. 2000). Since Puerto Rico became a Commonwealth, the First Circuit has also considered it an "independent sovereign" for purposes of dual-sovereignty doctrine under the Double Jeopardy clause. *See United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988). *But see United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (reaching contrary conclusion), *cert. denied*, 510 U.S. 1110 (1994). In an opinion by then-Judge Breyer, the First Circuit held that after Puerto Rico became a Commonwealth, it was to be treated as a State, not a territory, for purposes of the Sherman Antitrust Act. *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 42 (1st Cir. 1981). Congress has also enacted additional laws, since creating the Commonwealth, further expressing federal policy that Puerto Rico ought to be treated equivalently to a State. *See* Pub. L. No. 89-571, 80 Stat. 764 (1966). Thus, unlike federal judges in the territories of the United States, federal district judges in Puerto Rico are Article III judges, identical to federal district judges in the states.

"Puerto Rico occupies a relationship to the United States that has no parallel in our history. . . ." *Examining Board*, 426 U.S. at 596. Puerto Rico is not a state, but federal policy and this Court's doctrines have recognized since Puerto Rico became a Commonwealth that, for virtually all purposes this Court has addressed, Puerto Rico's legal status should be understood similarly to that of a State. As then-Judge Breyer wrote for the First Circuit:

> In sum, Puerto Rico's status changed from that of a mere territory to the unique status of a Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600 [creating the Commonwealth], the Puerto Rico Federal Relations Act and the rights of the people of Puerto Rico as United States citizens. *Cordova,* 649 F.2d at 41.

The Puerto Rico Supreme Court's refusal to recognize the dormant commerce clause as binding on Puerto Rico is inconsistent with the basic legal structure reflected in these precedents and in Congress's policies concerning Puerto Rico. Just as the First and Fourth Amendments apply of their own force in Puerto Rico, so too does the dormant commerce clause, as the federal courts have concluded uniformly. The Commonwealth and the United States are part of an integrated economic union; Puerto Rico

cannot enact, facially or by stealth, protectionist legislation that discriminates in purpose and effect against mainland and foreign producers vis a vis their local economic competitors. This Court's review is necessary to clarify that Puerto Rico's legal status requires Puerto Rico to comply with the dormant commerce clause and thereby accept the duties as well as the benefits of the state-like status recognized in these numerous precedents.

II. This Court's Review Is Required To Ensure Uniform Enforcement Of The Federal Relations Act, The Fundamental Law That Governs United States-Puerto Rico Relationships

The Puerto Rico Federal Relations Act (FRA) is the fundamental statutory charter that governs United States-Puerto Rico relations. Section 3 of the FRA forbids the Commonwealth from discriminating "between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico." 48 U.S.C. § 741a (2000). Even if the dormant commerce clause does not apply, this Court's intervention is warranted to ensure that the Puerto Rico courts honor the basic federal statutory framework that defines Puerto Rico's powers, obligations, and relationship to the United States.

The FRA embodies the terms on which Congress, in the 1950s, recognized the transformation of Puerto

Rico from the status of an ordinary territory to that of a Commonwealth. *See* Act of July 3, Pub. L. No. 81-600, § 4, 64 Stat. 319 (1950); *Examining Board*, 426 U.S. at 593; *Calero-Toledo*, 416 U.S. at 674 n.9. Within the framework of the FRA and the United States Constitution, Puerto Rico is now self-governing. *Examining Board*, 426 U.S. at 594.

The FRA, like the dormant commerce clause, bars Puerto Rico from enacting facially neutral statutes whose intent and effect is nonetheless protectionist. Thus, even before the Commonwealth's existence, the First Circuit had held, under the predecessor provision in the Organic Act of Puerto Rico (drafted in identical terms to § 3 of the FRA[12]), that "[w]here a statute in terms is non-discriminatory but its avowed intent and necessary effect is to favor local products over similar foreign products, it is the duty of the courts to declare the statute void." *San Juan Trading Co. v. Sancho*, 114 F.2d 969, 974 (1st Cir. 1940) (holding illegal a Puerto Rico statute that imposed differential taxes on round and square matches), *cert. denied*, 312 U.S. 702 (1941).

In words that apply directly here, the First Circuit concluded that Puerto Rico cannot "impose a discriminatory excise tax designed to foster Island

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[12] Section 3 of the Organic Act of Puerto Rico provided that "no discrimination be made between the articles imported from the United States or foreign countries or manufactured in Porto Rico." Act of March 2, 1917, 39 Stat. c. 145, p.951 *et seq.*

industry at the expense of that of the continental United States or foreign countries." *Id.* at 973. *See also Lugo v. Suazo*, 59 F.2d 386, 389 (1st Cir. 1932) (holding illegally discriminatory a Puerto Rico Act that required dealers in foreign coffee to pay a licensing fee that could not be justified as necessary to defray inspection and enforcement costs); *cf. Sancho v. Corona Brewing Corp.*, 89 F.2d 479, 481 (1st Cir.), *cert. denied*, 302 U.S. 699 (1937) (refusing to construe Puerto Rico ten-year tax exemption for "properties" of new industries to extend to the products such industries produced on the ground that otherwise the exemption would violate the non-discrimination provisions of federal law).

The FRA replaced the Organic Act and is now the fundamental statutory framework that defines United States-Puerto Rico relations. Yet, as this case demonstrates, the Supreme Court of Puerto Rico has never given effective content to § 3 of the FRA. Despite numerous federal court decisions invalidating Puerto Rico laws and regulations as protectionist, the Puerto Rico Supreme Court has never found any law or regulation of Puerto Rico to be illegal protectionism in violation of § 3. Indeed, although this case obviously involves a major dormant commerce clause and FRA challenge to a differential tax scheme, whose effect is dramatically to alter the beer market in favor of the one local producer, the Puerto Rico Supreme Court refused even to write an opinion addressing the merits.

Moreover, the Puerto Rico courts dismissed petitioners' complaint based on nothing more than a motion to dismiss. If the complaint in this case can be dismissed at that stage, it means that no challenge to a facially neutral law, based either on the dormant commerce clause or FRA or both, can ever be maintained successfully in the Puerto Rico courts.

III. This Court's Review Is Particularly Warranted Because This Court Affords The Only Federal Forum In Which Federal Claims Against Protectionist Puerto Rico Tax-Code Provisions Can Ever Be Heard

On the merits, the decision of the Puerto Rico courts to dismiss petitioners' dormant commerce clause and FRA claims at the pleading stage is wrong and should be reversed. Petitioners alleged that the differential taxation scheme, while neutral on its face, was protectionist in purpose, structure, and effect. Their offers of proof included ample evidence of protectionist purpose and effect: the testimony of an expert economist regarding the structure of the Puerto Rico beer market and the protectionist effect Law No. 69 had on that market, as well as evidence concerning the general context in which this law was enacted and its legislative process and history, which would show that it was adopted for a protectionist purpose. *See* Complaint ¶¶ 23, 25, 26, 29, 31, 33, 39, 42, 43, 44, 47, 51, 61; App. at 225-39. Other than through exactly these sorts of proofs of effects, purpose, and context, there is no other way to establish

that a facially neutral law is a pretext for economically protectionist legislation.

If petitioners are able to prove their factual allegations, there is no question that their claims would establish constitutional and FRA violations, despite the facial neutrality of Law No. 69. *See, e.g., New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (explaining that dormant commerce clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hunt v. Wash. State Apple Adver. Comm.*, 432 U.S. 333 (1977). Indeed, even under the narrowest understanding of the dormant commerce clause, petitioners' claims and offers of proof adequately state a dormant commerce clause (and FRA) claim. As a law that is neutral on its face but whose purpose and effect is to protect a local private industry against its out-of-state competitors, Law No. 69 is "indistinguishable from a type of law previously held unconstitutional by the Court." *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mngmt. Authority*, 127 S. Ct. 1786, 1798 (2007) (Scalia, J., concurring in part).

Finally, this Court's intervention is particularly warranted because this Court is the only federal court able to review any of petitioners' federal claims. In cases challenging provisions in Puerto Rico's tax code as protectionist, no federal court jurisdiction exists over original actions to enforce the dormant commerce clause or the FRA. The Butler Act, a statute

analogous to the Tax Injunction Act, 28 U.S.C. § 1341, specifically denies federal district courts in Puerto Rico the power to hear any suit "for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico. . . ." 48 U.S.C. § 872. Petitioners and other off-island producers of beer have tried for over 25 years to get to a federal forum for adjudication of their federal claims, but have been unable to do so. The Butler and Tax Injunction Acts have precluded the lower federal courts from hearing dormant commerce clause and FRA challenges to the very protectionist excise tax scheme at issue here and to its predecessors.

Thus, when Puerto Rico enacted Act No. 37 in 1978, which first created the differential tax scheme that favored local beer producers, off-island beer producers and their trade association challenged the Act in federal court on commerce clause and FRA grounds. And indeed, the federal district court in Puerto Rico (Torruella, J.) described Act No. 37 as a "prima facie" violation of the FRA. *U.S. Brewers Ass'n v. Perez*, 455 F. Supp. 1159, 1162 (D. P.R. 1978). Nonetheless, the First Circuit reversed and held that the Butler Act denied federal courts jurisdiction to adjudicate that claim. *U.S. Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979). When the plaintiffs were then forced to litigate in the local courts, the Puerto Rico Supreme Court rejected their federal claims, *U.S. Brewers Ass'n v. Perez*, 109 D.P.R. 456 (1980), just as it has rejected every other challenge alleging that actions of

the Puerto Rican government violate the commerce clause or FRA.

Similarly, when Puerto Rico expanded the protectionist effect of this scheme and enacted Laws No. 69 and 108 in 2002 and 2004, Coors Brewing Co. challenged those laws as protectionist in federal district court (Coors argued that it was "futile" to pursue its federal claims in the Puerto Rico courts, precisely because those courts refused to recognize the dormant commerce clause's applicability[13]). But the federal district court held that the Butler and Tax Injunction Acts, again, precluded federal jurisdiction. *Coors Brewing Co. v. Calderon*, 225 F. Supp. 2d 22 (D. D.C. 2002). There continues to be no federal forum, other than this Court on review of the Puerto Rico Supreme Court's decision, in which petitioners' federal claims can be adjudicated.

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[13] *See* Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 2, *Coors Brewing Co. v. Torres* (Civ. No. 06-2150) (D. P.R. 2007). Coors initially filed its federal action in the federal district court for the District of Columbia, which dismissed that complaint due to the Butler and Tax Injunction Acts. Coors then filed a second action in the federal district court in Puerto Rico. That court likewise dismissed Coors' federal claims on the ground that the district court in the District of Columbia had already determined that the Butler and Tax Injunction Acts barred the suit. Thus, as has been true since Puerto Rico's differential taxation scheme was first created in 1978, the federal courts remain unavailable to hear federal constitutional and statutory challenges to this scheme. It remains the case that this Court is the only federal Court able to hear petitioners' federal claims.

Absent this Court's review, then, the Puerto Rico courts are the only forum in which protectionist uses of the Puerto Rico tax code can be challenged. Yet the Puerto Rico courts refuse to recognize the applicability of the dormant commerce clause to Puerto Rico, are in direct conflict with the federal courts on this issue, have never found an act of the Puerto Rican government to violate either the dormant commerce clause or the FRA, and in this case – obviously a substantial and important challenge to a scheme the federal district court in Puerto Rico has characterized as a "prima facie" violation of the FRA – dismissed the federal claims at the pleading stage. Rather than faithful enforcers of federal constitutional and statutory law, the Puerto Rico courts appear to be willing agents in the protectionist schemes of the Puerto Rican legislative and executive branches.

As then-District Judge Torruella predicted, if federal courts lack jurisdiction over FRA claims which allege that Puerto Rico tax code provisions are illegally protectionist, "the clear congressional policy envisaged in Section 3 of [the FRA]" would be rendered "virtually inoperative." *U.S. Brewers Ass'n v. Perez*, 455 F. Supp. at 1162. That is precisely what has happened. To resolve the conflict over the dormant commerce clause and to ensure that the Puerto Rico courts faithfully honor that clause and the FRA, this Court's review is necessary.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[CERTIFIED TRANSLATION]

THE SUPREME COURT OF PUERTO RICO

Puerto Rico Association of Beer Importers, Inc.; Heineken Brouwerijen B.V.; V. Suárez & Co., Inc.; Méndez & Co., Inc.; B. Fernández & Hnos., Inc., and Ballester Hermanos, Inc. v. Commonwealth of PR; José A. Flores Galarza, in his official capacity as Secretary of the Treasury; Cervecería India, Inc., and CC1 Beer Distributors, Inc.	**No.** CC-2003-831	CERTIORARI

JUDGMENT

San Juan, Puerto Rico, on May 16, 2007.

Public Law No. 69 of May 30, 2002 amended sections 4002 and 4003 of the Puerto Rico Internal Revenue Code, 13, L.P.R.A sects. 9521 and 9574. The purpose of the amendment was to raise taxes on distilled spirits, wines, and beers. However, Article 2 of Public Law No. 69 provides some relief by establishing a staggered tax exemption on all beers, malt

extracts, and other analogous fermented or non-fermented products whose alcohol content does not exceed one and one half percent (1½%) per volume, manufactured or elaborated by individuals whose total production during the most recent tax year does not exceed thirty-one million (31,000,000) gallons.

The petitioners herein, the Puerto Rican Association of Beer Importers, Inc. et al, filed a petition for declaratory judgment against the Commonwealth of Puerto Rico, et al, in the Court of First Instance, Superior Court, San Juan Part, requesting that the aforementioned Article 2 of Public Law No. 69 of 2002 be declared unconstitutional. They argued that, in their opinion, the purpose and effect of said statutory provision was to benefit beers manufactured on the Island and, naturally, to adversely affect imported beers. They also argued that said provision violated the Interstate Commerce Clause of the Constitution of the United States and Section 3 of the Federal Relations Act, 48 U.S.C. sect. 741(a).

The defendant requested that the complaint be dismissed alleging, in brief, that the decision issued by this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda*, 109, D.P.R. 456 (1980) had resolved the controversy and that there was no such constitutional violation. The court of instance *dismissed* the complaint, a decision that was *confirmed* by the Court of Appeals.

The plaintiff-petitioners then appealed before this court, pointing out three alleged errors on the part of the Court of Appeals, to wit:

> . . . by confirming the dismissal of the Sworn Petition without accepting as true the facts in the complaint while accepting as true others that did not arise from the complaint, contrary to the dismissal norm under Rule 10.2 of Civil Procedures and its interpretative case law.
>
> . . . by determining that Article 2 does not violate Sect. 3 FRA or the Commerce Clause, mistakenly applying the decision in *U.S. Brewers Assoc. v. Srio. De Hacienda*, 109 D.P.R. 456 (1980).
>
> . . . by restricting their analysis on the purpose of Article 2 to the text of Public Law No. 69, and ignoring the interpretation norm set by this Honorable Court.

We *agreed* to the appeal. Having examined the record of the case and after a careful analysis of the arguments of the parties, we *confirm* the judgment issued by the Court of Appeals *dismissing* the action filed by the plaintiff-petitioner.

So stated and ordered by the Court and certified by the Clerk of The Supreme Court. Associate Judges Mr. Rebollo López and Mr. Fuster Berlingeri issued Concurring opinions. Associate Judge Mrs. Fiol Matta inhibited herself. Associate Judge Mrs. Rodríguez Rodríguez, did not participate.

[Round ink stamp: Commonwealth of Puerto Rico, General Court of Justice, Supreme Court.]	[Illegible signature] Aida Ileana Oquendo Graulau Clerk of The Supreme Court

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CONCURRING OPINION OF
ASSOCIATE JUDGE MR. FUSTER BERLINGERI

San Juan, Puerto Rico, on May 16, 2007.

I concur with the judgment issued by the Court in the case in caption. It is clear to me that Art. 2 of Public Law No. 69 of May 30, 2002 **does not have any constitutional** effect, whereby the dismissal of the action brought by the plaintiffs is in order, as was correctly decided by the court of instance and the appellate court.

To resolve this case it is only necessary to apply to it the previous decisions of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda*; 109, D.P.R. 456 (1980), ***which dealt with an essentially identical situation to that of the case in caption***, as was correctly done by the court *a quo*. *U.S. Brewers Assoc.* v. *Secretario de Hacienda*, 109, D.P.R., *supra*, is a clear determining precedent for the controversy in the case in caption, that may be adjudicated simply by applying here the aforementioned precedent.

In spite of the above, I wish to deal in this opinion with the thorny subject of whether the limitations arising from the Interstate Commerce Clause of the

Constitution of the United States apply to Puerto Rico ex *proprio vigore*. The matter was argued in the case in caption, and gave rise to the other concurring opinion issued here, which I consider incorrect and inclined to cause confusion. This is why I feel it is important to consider the question fully.

This matter has been brought before our attention several times before, but this Court has dealt with it ambivalently, at least in recent times. The first times the matter was raised, this Court very deliberately resolved that ***the so called "dormant" aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*** We decided it thus, *before* the establishment of the Commonwealth of Puerto Rico, in the substantive decision *Ballester Hnos.* v. *Tribunal de Contribuciones*, 66 D.P.R. 560 (1946); and after the establishment of the Commonwealth of Puerto Rico, we resolved it again in the very considered and fundamental decision *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), and again in *South Puerto Rico Sugar Corp. v. Comision de Servicio Publico*, 93 D.P.R. 12 (1966). However, in spite of these clear and substantial precedents, more recently, in a case in which the issue was again argued, this Court wavered and decided not to reiterate the resolutions of the three previously quoted opinions, preferring to limit itself to pointing out that even if the Commerce Clause were applicable, the facts in question did not constitute a violation of said Clause. *M & B.S., Inc. v. Depto. de Agricultura*, 118 D.P.R. 319, 336 (1987).

I believe that the subject in question requires further study and reflection for the simple reason that the erroneous notion that the Interstate Commerce Clause of the Constitution of the United States applies to Puerto Rico *ex proprio vigore* places upon the government an unnecessary judicial burden that constitutes **one more limitation to its capacity to successfully manage the serious financial problems of Puerto Rico.** There is no other alternative, then, but to vehemently denounce the supposed applicability of the aforementioned clause, and explain the grounds for our interpretation.

II

Why do some people in Puerto Rico continue to believe, incorrectly, that our country is subject to the Interstate Commerce Clause of the Constitution of the United States? Why are the three decisions of this Court, quoted two paragraphs back, which definitively resolved the inapplicability to Puerto Rico of the federal regulation in question, not followed? What is the reason behind this insistence to introduce in our case law the erroneous judicial criterion that Puerto Rico is bound by the dormant aspect of the Interstate Commerce Clause of the Constitution of the United States?

The answer to these questions are to be found in a supposedly "key case" of the First Circuit Court of Appeals of the United States on which the other concurring opinion in this case is grounded. Said

opinion is, clearly, only a sequel to the aforementioned federal judgment, which has been mimicked here. This is why, we must go to the origin of the matter to critically examine the decision handed down there.

III

In 1932 the First Circuit Court of Appeals resolved that the Interstate Commerce Clause of the Constitution of the United States did not apply to Puerto Rico. It did so in *Lugo v. Suazo*, 59 F 2d 386 (1932); and reiterated it subsequently in *Buscaglia v. Ballester*, 162 F 2d 805, *cert. denied*, 332 US 816 (1947). So, for decades, both the Supreme Court of Puerto Rico and the Circuit Court of Appeals of the First Circuit Court of the United States repeatedly held that the aforementioned clause did not apply to Puerto Rico. The grounds for the decisions of the one and the other were essentially the same and may be summarized as explained below.

From the very beginning, the relationship between the United States and Puerto Rico has been subject to the fundamental principle that the ***Constitution of the United States does not apply fully to Puerto Rico, because the Island is not and has never been an incorporated State of the Union and is not an integral part of the United States***. The Supreme Court of the United States has repeatedly found that only those guarantees of the principal and basic rights of individuals in the Constitution of

the United States, which due to their very nature always limit the enforcement of the U.S. Executive and Legislative powers apply fully to Puerto Rico. One of the clauses of the Constitution of the United States that no Federal Court had applied to Puerto Rico, was precisely the Commerce Clause, which provides that Congress has the power to regulate "... ***commerce ... among the several States*** ...". Puerto Rico, of course, is not a "State", and this is why it has been repeatedly found that the Island was not covered by the Congressional power to regulate commerce between States. ***The above does not mean that commerce between Puerto Rico and the United States was not subject to the power of Congress.*** Only that it was regulated solely through the clause that grants Congress the power to regulate United States Territories, known as the Territorial Clause. For this reason, the Commerce Clause, in its "dormant" aspect had always been conceived as a ***limitation of the powers of the States***, never as a limitation of the governing powers of the Territories.

With respect to the argument in the preceding paragraph, consideration must also be given to the United States Supreme Court's known reluctance to accept as applicable to Puerto Rico any provision in said Constitution that refers literally to the "States" of the Union *(States)*. Thus, in *Puerto Rico v. Branstad*, 107 S.Ct. 2802 (1987), the Supreme Court of the United States applied to Puerto Rico ***the extradition statues of the United States*** which expressly encompass the territories of the United

States, so as not to have to determine whether the Extradition Clause of the Constitution of the United States, Art. IV, Sec. 2, applied to Puerto Rico.[1] The highest federal court stated the following:

> "It is true that the words of the [Extradition] clause apply only to "States" and we have never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution. We need not decide today what applicability the Extradition Clause may have to the Commonwealth of Puerto Rico, however, for the Extradition Act clearly applies. The Act requires rendition of fugitives at the request of a demanding "Territory", as well as a State."

The alluded reluctance, illustrated by the case *Puerto Rico v. Branstad*, *supra*, has been reflected in other important decisions of the Supreme Court of the United States regarding Puerto Rico. Thus, in *Calero Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974), said court determined that the due process and equal protection of the law guaranties applied to Puerto Rico, but refused to find that Amendment Fourteen of the Constitution of the United States, that expressly extends these guarantees to the States of the Union, was applicable to Puerto Rico, because

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[1] The Extradition Clause, where relevant, reads as follows: "Any person accused of a . . . crime . . . who flees the State where he is accused and is found in another State, shall be . . . returned to the State having jurisdiction to judge the crime.

it is not a State. The Court chose instead to find that the aforementioned constitutional rules applied to Puerto Rico under the Fifth or the Fourteenth Amendment, without stating which ("*Either-or*"). The same thing happened in *Examining Board v. Flores Otero*, 426 US 572 (1976). In this case, one of the Judges of the Court, Judge Rehnquist, who later became Chief Judge, stated the following in his own opinion:

> "The Fourteenth Amendment is by its terms applicable to States: Puerto Rico is not a State . . . I would be inclined to reject the claim that the Fourteenth Amendment is applicable to Puerto Rico until a case sufficiently strong to overcome this "plain meaning" obstacle, found in the language of the Amendment itself, is made out."

In view of the above, which refers to cases resolved ***after*** the creation of the Commonwealth of Puerto Rico, it seems evident that the very Supreme Court of the United States would not be willing to hold that the provision of the Constitution of the United States that regulates commerce " . . . *among* . . . *the several States*" in any way refers to Puerto Rico, which is clearly not a State.

When the Federal Court of the First Circuit decided to revoke itself regarding this matter in 1992, it did so based on a very limited and superficial analysis, that in no way replicated the grounds of the opposing precedents of both that same court and those of this Court. Its "analysis" was essentially

based on two points. First, that the creation of the Commonwealth of Puerto Rico made every effort to grant to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. Wherefore, the Court reasoned, the limitations that applied to the States of the Union also applied to Puerto Rico.

Note that this first argument is incongruous, not to say mistaken, in that it ***derives a limitation of power by invoking the concession of autonomous power.*** The false argument is that since the creation of the Commonwealth of Puerto Rico granted to the Island a greater degree of autonomy than that which it previously had, comparable to that enjoyed by the States of the Union, it also acquired a limitation of power that it did not have before. That is, to the repeated affirmation of the Supreme Court of the United States recognizing the ***greater autonomy*** given to the Island by the creation of the Commonwealth of Puerto Rico (*Puerto Rico v. Branstad*, *supra*; *Examining Board of Engineers v. Flores de Otero*, *supra*), the First Circuit Court added, on its own, ***a limitation***, that does not arise in any way or manner from the expressions of the higher federal court, and that is in no way consistent with the clear intention of the Supreme Court of the United States to ***underscore*** the importance of that which was created by Public Law No. 600. The Supreme Court of the United States, which has claimed the authority to determine what clauses of the Constitution of the United States apply to Puerto Rico for itself only, in

the absence of some related Congressional provision [*Torres v. Puerto Rico*, 442 US 465 (1979); *Examining Board v. Flores de Otero, supra*] has never determined that the Commerce Clause applies to Puerto Rico, even when the matter has been brought before it. In spite of this, however, the federal intermediate appellate court has had the audacity to intrude in this matter, and decree that which the highest judicial court has deemed unacceptable to determine.

Moreover, the belief by the Supreme Court of the United States, that the creation of the Commonwealth of Puerto Rico, had the effect of equating Puerto Rico and the other States of the Union in terms of autonomy and independence can scarcely be managed with the indulgence applied by the First Circuit Court in the case law that concerns us herein. This is so, not only because the Congressional reports regarding Public Law No. 600 emphasize that the creation of the Commonwealth of Puerto Rico did not propose to alter the relationship between the United States and Puerto Rico, ***fundamentally*** [see, *US* v. *Lopez Andino*, 831 F.2d 1164 (1987), concurrent opinion of Judge Torruella], but also because of the other undeniable fact that the very autonomy of the States of the Union is grounded, in great measure, on their political powers of full Congressional representation and presidential vote, which Puerto Rico does not have; and on the guarantee provided by the Tenth Amendment of the Constitution of the United States, which does not include Puerto Rico. Therefore, we must be cautious and not expect to reach new and

strange conclusions, based on the premise that Puerto Rico has the same "autonomy and independence" as a State of the Union.

Finally, in considering the matter that occupies us here, regarding the meaning that may be derived from the creation of the Commonwealth of Puerto Rico, it is necessary to consider what the very Supreme Court of the United States has said, in the sense that

> " . . . Puerto Rico . . . is an autonomous political entity, sovereign over matters not ruled by the Constitution . . . "

Posadas v. Tourism Co., 478 US 328 (1986); *Rodriguez v. Popular Democratic Party*, 457 US 1, 8 (1982). It would seem that the proposition of imposing a limitation on the legislative powers of Puerto Rico based on the "dormant" aspect of the Commerce Clause is clearly inadmissible and inconsistent with this other expression of the Supreme Court of the United States. At least, the position of the other concurring opinion in this case echoing now the decree in question of the First Circuit is no way in harmony with the repeated expressions of the Supreme Court of Puerto Rico regarding the broad judicial authority of the Commonwealth of Puerto Rico. See, *Ramirez de Ferrer v. Mari Bras*, 144 D.P.R. 141 (1997); *Pueblo v. Castro Garcia*, 120 D.P.R. 740 (1988); *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), and *Pueblo v. Figueroa*, 77 D.P.R. 188 (1954).

IV

The other point on which the First Circuit based its aforementioned decision of 1992 is the idea that Puerto Rico shares full economic integration with the United States, in equal terms to all other States of the Union. The supposed "logic" of this other finding is that since Puerto Rico has a comparable situation to that of a State of the Union with regard to "economic integration with the United States", the same limitations that apply to the States of the Union in terms of interstate commerce should apply to Puerto Rico. The problem with this other argument is that it is as false as the first, which was discussed in the previous paragraphs.

The idea that Puerto Rico shares a comparable situation to the States of the Union in terms of economic integration with the United States flies in the face of several realities that are well known to those dealing with these matters. To begin, Puerto Rico is not subject to the federal internal revenue laws as are the States of the Union. On the one hand, the residents of Puerto Rico do not pay income taxes, as do the residents of the States of the Union. The funds obtained from federal excise taxes collected in the United States corresponding to articles and materials manufactured in Puerto Rico – excise taxes on rum – are earmarked for our treasury, contrary to what happens with other federal excise taxes collected in the States of the Union on articles and materials manufactured in these States, that are treated as revenues of the federal treasury. Puerto Rico's aforementioned

special tax status, which in and of itself represents billions of dollars per year and benefits Puerto Rico's economy is not accessible to any State of the Union, and is clearly contrary to the foregoing false notion of equal "economic integration".

Another difference between the States of the Union and Puerto Rico in the economic aspect is that the *Interstate Commerce Act* of the United States expressly does not apply to the Island, although it regulates intensely several transportation aspects of the States of the Union. This situation is a serious problem for those who affirm that the Interstate Commerce Clause of the Constitution of the United States applies to Puerto Rico. It is clearly inconsistent, to say the least, to consider that the foregoing constitutional provision has been extended to the Island tacitly by Congress, but that one of the principal statues legislated by that very Congress under such provision, is not extensive to Puerto Rico. The other concurrent opinion issued in this case does not even attempt to sort out this tangle. Either way, the statute in question applies to the States of the Union, but not to Puerto Rico, which is part of the broad differences between the States and Puerto Rico with regard to economic affairs.

Another very particular difference must also be noted regarding tariffs on coffee. In accordance with Section 10 of Article I of the Constitution of the United States, the States of the Union are generally prohibited from imposing taxes on imports. However, Puerto Rico has been expressly authorized to impose

tariffs on imported coffee, although the States of the Union cannot do so. See 19 USC sec. 1319; *Miranda v People of P.R.*, 101 F 2d 26 (1938). This way, Puerto Rico can protect its own coffee industry from competition against imports of cheaper foreign coffees.

Also, with respect to internal revenues and tariffs on coffee, there are several other judicial and regulatory federal arrangements, also of an ***economic nature***, whose application to Puerto Rico is very different to that of the States of the Union. They are too extensive to mention here. Suffice it to say that it refers to matters of great economic importance regarding which the situation in Puerto Rico is notably different from that of any State of the Union. Thus, financial aid programs, including the food assistance program, Social Security, minimum federal wage, some banking and federal labor laws, laws dealing with customs tariffs, laws related to the admiralty and maritime transportation, and several regarding other matters apply or have historically applied differently in Puerto Rico as compared to the States of the Union. See, A.H. Leibowitz, *The Applicability of Federal Law to The Commonwealth of Puerto Rico*, 37 Rev. Jur. UPR 615 (1968).

With respect to the above, it is also necessary to take into consideration the repeated position of the Supreme Court of the United States validating the differential treatment of Congress with regard to Puerto Rico, as compared to the treatment given by Congress to the States of the Union regarding all these economic questions. The highest federal court

has expressly resolved ***that Congress does not have to give to Puerto Rico the same economic treatment it gives to the States***, legitimizing, thus, the important differences that exist or have existed between Puerto Rico and the States. Thus, the very Supreme Court of the United Slates has rejected the notion that the Island and the States of the Union share the same economic integration with the United States. Some of these decisions, to quote only the most recent, are *Harris v. Rosario*, 446 U.S. 651 (1980), where the Supreme Court of the United States determined that Congress was not obliged to treat Puerto Rico like a State in the Aid to Families with Dependent Children program; and *Califano v. Torres*, 435 U.S. 1 (1978), where the Supreme Court of the United States determined the same thing with respect to the Supplemental Security Income program (SSI).

It must be pointed out that the Supreme Court of the United States has upheld the validity of differential treatment for Puerto Rico not only when Congress has given the Island *less* benefits than those stipulated for the residents of the States of the Union, as in the two cases quoted in the previous paragraph, but also when the differential treatment has meant giving *more* authority to Puerto Rico than to the States of the Union, such as *West India Oil Co. v. Domenech*, 311 US 20 (1940), relative to the power to impose excise taxes on imports, in which the Supreme Court of the United States validated a power granted

by Congress to Puerto Rico that the States of the Union did not possess.

For all these reasons it cannot be truthfully affirmed that Puerto Rico is comparable to any State of the Union in terms of national economic integration. ***Puerto Rico, like the Unincorporated Territories, has always been subject to different important rules*** to those that apply to the States of the Union. Such different treatment has attempted to provide the necessary economic flexibility so that both Congress and Puerto Rico itself can successfully confront the significant material differences that have existed and still exist between the Island and the jurisdictions that are an integral part of the United States. It appears it is necessary to mention the well-known fact that, notwithstanding the economic progress Puerto Rico has experienced since the terrible years from 1898 to 1940, there is still an abysmal difference between its fragile economic situation and the very superior condition of the poorest State of the United States. It makes no sense, then, to attempt to impose an artificial limitation to the powers of Puerto Rico to confront its own economic problems, based on simple judicial whim. Neither the opinion of the First Circuit nor the other concurrent opinion in the case in caption have identified ***what purposes of public order they attempt to achieve with their muddled decree.*** What justification is there for their decision? Beyond their erroneous design, what is the reason for the inattention to the three precedents of this same Court? Who

does it harm if Puerto Rico has powers that the States of the Union do not have?

V

The questions put forth in the previous paragraph lead to one last critical point. The question of whether the Interstate Commerce Clause of the Constitution of the United States should be applied to Puerto Rico or not, like the more general question of what provisions of the Constitution of the United States should be extended to the Island, beyond those relative to the fundamental rights of individuals, ***is ultimately a Congressional prerogative***.

See, *Torres v. Puerto Rico*, *supra*, pp 469-470. It is an eminently political issue that is included, also, within the broad powers that the very Supreme Court recognized to Congress, even recently. *Harris* v. *Rosalie*, *supra*, pp. 653-656. For this reason, the decisions of the First Circuit submitting Puerto Rico *ex proprio vigore* to the limitations of the Commerce Clause in its "dormant" clause is an *ultra vires* act by that Court, a clearly inappropriate intervention of the court in a matter that lies beyond its authority. There is nothing in the legislative record that leads us even to suppose that Congress has had the intention to extend the aforementioned clause to Puerto Rico. Therefore, it is not possible to believe that the decisions of the First Circuit Court constitute only a statement of the Congress' intent. They constitute,

therefore, an inappropriate interference in an issue that is the clear and sole prerogative of Congress.

It is for these very reasons that I consider untenable the other concurring position in the case in caption echoing the federal appellate court, and mimicking its very mistaken and erroneous decisions regarding the matter.

[Signed: Jaime B. Fuster]
JAIME B. FUSTER BERLINGERI
ASSOCIATE JUDGE

[Translators Note: All pages except last, left margin, one set of initials – JBF]

CONCURRING OPINION OF
ASSOCIATE JUDGE MR. REBOLLO LOPEZ

San Juan, Puerto Rico, on May 16, 2007.

On July 13, 1978, Public Law No. 37 was passed to amend Public Law No. 143 of June 30, 1969, known as the Puerto Rico Beverages Act. Said amendment raised the taxes on beers sold and consumed in our jurisdiction and established a special exemption for beer manufacturers whose annual production does not exceed thirty-one million (31,000,000) gallons.

Some time later, the U.S. Brewers Association, an entity that at that time included 95% of beer manufacturers in the United States, filed a complaint before the local courts challenging the exemption

because, in their opinion, it violated Section 3 of the Federal Relations Act and the clause regarding equal protection under the law, Sect. 7, Article 2, of the Constitution of the Commonwealth of Puerto Rico. When it resolved the controversy, this court determined that the exemption did not violate the aforementioned provisions, because, among other things, it had a legitimate, non-discriminatory purpose, and because the classification established thereunder could benefit both local companies and foreign companies. *U.S. Brewers Assoc.* v. *Secretario de Hacienda,* 109, D.P.R. 456 (1980).

After two previous amendments with the sole purpose of raising the amount of the tax[1], the Legislature passed *Public Law No. 69 of May 30, 2002,* which amended sections 4002 and 4003 of the Puerto Rico Internal Revenue Code, 13 L.P.R.A. §§ 9521 and 9574. The purpose of the amendment, among others, was to raise the taxes on distilled spirits, wines, and *beers*. Article 2 of Public Law No. 69 provided some relief by establishing a *staggered tax exemption* on all beers, malt extracts, and other analogous fermented or non-fermented products whose alcohol content did not exceed one and one half percent (1½%) per volume, manufactured or elaborated by individuals whose total production during the most recent tax

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[1] See, Public Law No. 12 of June 10, 1981 and Public Law No. 22 of July 14, 1989.

year did not exceed thirty-one million (31,000,000) gallons measure.[2]

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[2] The aforementioned Article 2 provides as follows:

"(a) Instead of the tax established in sect. 9521(c)(2) and (3) of this title on all beers, malt extract, and other fermented or unfermented analogous products, whose alcohol content exceeds one and half percent (1½%) per volume to which sect. 9521(c)(2) and (3) of this title refers, that are produced or elaborated by individuals whose total production, if any, of said products in the most recent tax year has not exceeded thirty-one million (31,000,000) gallons measure, taxes will be collected as follows:

(1) Two dollars and fifteen cents ($2.15) for each gallon measure produced, up to nine million (9,000,000) gallons measure.

(2) Two dollars and thirty-six cents ($2.36) for each gallon measure produced in an amount greater than nine million (9,000,000), but less than ten million (10,000,000) gallons.

(3) Two dollars and fifty-seven cents ($2.57) for each gallon measure produced in an amount greater than ten million (10,000,000), but less than eleven million (11,000,000) gallons.

(4) Two dollars and seventy-eight cents ($2.78) for each gallon measure produced in an amount greater than eleven million (11,000,000), but less than twelve million (12,000,000) gallons.

(5) Two dollars and ninety-nine cents ($2.99) for each gallon measure produced in an amount greater than twelve million (12,000,000), but less than thirty-one million (31,000,000) gallons.

(b) Subject to the provisions of sects. 9575 to 9579 of this title, the benefits of this section will apply to any individual, in any tax year following the year when his total production of the products described in this paragraph, if any,

(Continued on following page)

Thus things, on June 13, 2002, the Puerto Rican Association of Beer Importers, Inc. (APIC, Spanish acronym) Heineken Brouwerijen B.V.; V. Suárez & Co, Inc.; Méndez & Co., Inc.; B. Fernández Hnos., Inc. and Ballester Hermanos, Inc. – hereinafter the petitioners – filed a petition for declaratory judgment before the Court of First Instance, Superior Court, San Juan Part against the Commonwealth of Puerto Rico, the Secretary of the Treasury, Cervecería India, Inc., and CC1 Beer Distributors, Inc., hereinafter the appellees. They requested that Article 2 of Public Law No. 69 of 2002 be declared unconstitutional, because, in their opinion, its purpose and effect was to benefit beers produced on the Island and adversely affect imported beers. They also requested that the declaratory judgment state that the foregoing Article 2 violated both the Interstate Commerce Clause of the Constitution of the United States[3] and Section 3 of the Federal Relations Act.[4] Finally, they requested that it grant a preliminary injunction preventing the Government of Puerto Rico from enforcing the aforementioned legal provision until the case was heard.

Subsequently, all the defendants requested the *dismissal* of the action filed, opposing the request for

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has not exceeded thirty-one million (31,000,000) gallons measure.

[3] Article 1, Sect. 8, Constitution of the United States of America.

[4] 48 U.S.C. § 741(a) and 1 L.P.R.A. Federal Relations Act § 3.

a preliminary injunction.[5] In essence they argued that, even if they accepted as true the facts alleged in the action filed, the plaintiff had not offered a claim to justify granting the remedies requested. They argued, in support of their request, that the decision in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* controlled the controversy in the present case; that the Interstate Commerce Clause had not been violated, because the exemption was totally neutral and did not discriminate against interstate or international commerce on its face or with regard to its purpose or effects; and that the Federal Relations Act had not been violated, because the Court had already decided on the legality of that provision.

After evaluating the positions of both parties in their respective writs and the arguments offered in the hearing to present arguments, the primary court issued a judgment *dismissing* the action filed by the plaintiffs. The court held that: 1) the decision of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* had resolved the plaintiffs' claim that Article 2 of Public Law No. 69, *ante,* violates Section 3 of the Federal Relations Act, *ante*; 2) that the argument that the challenged exemption violated the interstate and international Commerce Clause lacked merit because in *U.S. Brewers Assoc., ante,* this Court

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[5] The defendants appeared in two different motions; on the one hand Cervecería India and its distributor, and on the other hand, the Commonwealth of Puerto Rico and the Secretary of the Treasury.

had decided, although it was not specifically stated, that said exemption had the legitimate purpose of distributing the tax load among all brewers according to their potential to generate earnings[6]; and 3) that the analysis demanded in the face of allegations of supposed violations of the interstate and international Commerce Clause, for the supposed discriminatory effect of some Act, revealed that the article challenged in this case was not discriminatory.

Dissenting from the decision of the primary court, the defendants petitioned to the Court of Appeals, through a petition for certiorari. They argued, in brief, that the court of instance had erred when it dismissed the action filed without accepting as true the facts alleged in the complaint, and by not receiving the evidence offered with respect to the discriminatory purpose and effects of the exemption. They also argued that the court of instance had incorrectly interpreted the case *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* by deciding that the challenged exemption did not violate Section 3 of the Federal Relations Act or the aforementioned interstate and international commerce act.

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[6] The primary court made this decision because, among other things, "the decisions of whether the intent of the Puerto Rico Legislature against imported beers was discriminatory, and whether the Act applies only to local companies and, therefore, has a discriminatory effect, is the same regardless of whether the claim is for a violation of Section 3 of the Federal Relations Act and equal protection under the law, or for an alleged violation of the interstate and international Commerce Clause."

The Court of Appeals *confirmed* the decision of the primary court. In essence, the intermediate appellate court held that the primary court acted correctly in dismissing the action filed, because it did accept as true the facts correctly alleged in the complaint and that the rest of the "facts" stated therein were conclusions of law or speculative statements. As regards the alleged offerings of evidence, the intermediate appellate court concluded that the primary court did, in fact, accept them as true, but even so, this did not merit granting a remedy in favor of the defendants. Finally, the aforementioned appellate court determined, that, pursuant to the *stare decisis* doctrine, the decision of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* applied to the controversy herein with respect to Section 3 of the Federal Relations Act, and that it did not have protectionist purposes that would make it invalid in the light of the interstate and international Commerce Clause of the Constitution of the United States.

Dissenting, the plaintiffs petitioned this Court, through a petition for certiorari. They argue that the judgment issued by the intermediate appellate court should be revoked because said court erred when it:

> . . . confirmed the dismissal of the Sworn Petition without accepting as true the facts in the complaint while accepting as true others that did not arise from the complaint, contrary to the dismissal norm under Rule 10.2 of Civil Procedures and its interpretative case law.

> . . . decided that Article 2 does not violate Sect. 3 FRA or the Commerce Clause, erroneously applying the decision in *US. Brewers Assoc.* v. *Secretario de Hacienda,* 109 D.P.R. 456 (1980).
>
> . . . restricting its analysis regarding the purpose of Article 2 to the text of Public Law No. 69, therefore ignoring the interpretation rule established by this Honorable Court.

I

A

To begin, we will briefly discuss the first finding of error, regarding the alleged inappropriateness of the dismissal based on the provisions of Rule 10.2 of Civil Procedures.

As is well known, the purpose of the pleadings is to notify, in broad terms, the claims and defenses of the parties. *Alamo Perez* v. *Supermercado Grande,* 158 D.P.R. 93 (2002); *Banco Central Corp.* v. *Capitol Plaza, Inc.,* 135 D.P.R. 760 (1994). This is why Rule 6.1 of Civil Procedures, 32 L.P.R.A. App. III, R. 6.1 only requires that the pleadings in a complaint include a brief and simple description of the claim showing that the petitioner is entitled to a remedy, and a request for the remedy to which he believes he is entitled. See: José Cuevas Segarra, Tratado de Derecho Procesal Civil, Publicaciones J.T.S., Volume I, 2000, p. 202-208.

In spite of this, Rule 10.2 of Civil Procedures, 32 L.P.R.A. App. III, R. 10.2 establishes, as grounds for a party to request the dismissal of a complaint filed against it, that the pleadings fail to state a claim upon which relief can be granted. We have repeatedly decided that when a request for dismissal under the aforementioned grounds is made, the court must accept as true the pleadings in the complaint and consider them as favorably as possible for the plaintiff. *Garcia Gomez* v. *E.L.A.,* res. February 24, 2005, 2005 TSPR 14.

For a defendant to prevail in a motion for dismissal under the aforementioned civil procedure principle, he must show that, without a doubt, the plaintiff is not entitled to any remedy under any rule of law that may be proven to support his claim, even if the complaint is interpreted as liberally as possible in his favor. Regardless of the above, this doctrine applies only to claims that are argued correctly and clearly and are conclusively stated, that on their face do not give rise to doubts. *Pressure Vessels P.R.* v. *Empire Gas, P.R.,* 137 D.P.R. 497, 504-505 (1994). In other words, only claims that are put forward correctly will be accepted as true, and any conclusions of law or arguments expressed in such a way that its contents appear to be hypothetical will not be considered. Cuevas Segarra, *op. cit.,* p. 272.

An analysis of the sworn petition submitted by the petitioners in the present case shows that basically they argued that the tax exemption granted to beer distributors that produced less than 31,000,000

gallons was unconstitutional because it violated the Interstate Commerce Clause of the Constitution of the United States and Section 3 of the Federal Relations Act. In support of the above they made a series of arguments that attempt to establish the discriminatory effects of the exemption. Some of these arguments are:

> "*Paragraph 18*: This action attempts to annul – as they are contrary to the Federal Relations Act and the Commerce Clause of the Constitution of the United States – those sections that create an exception to the tax rate in favor of a private Puerto Rican manufacturing company, in detriment of international and interstate commerce and the proprietary interests of other companies, local, of the United States, or foreign, which are suffering and will continue to suffer irreparable damage . . .
>
> *Paragraph 19*: In effect, and as argued below, the discrimination of the legislation in question is such that it practically eliminates the right of consumers to purchase the beer they prefer and promotes a state-sanctioned monopoly in favor of one sole producer and its exclusive distributor.
>
> *Paragraph 38*: All the plaintiffs are affected by the tax, because the special law does not apply to them.
>
> *Paragraph 39*: By information and belief, only the local producer, Cervecería India, and its distributor for Medalla Light, its principal

product, will benefit from the special exemption, that is, they are now subject to paying only the $2.15 excise tax that applied to them under the previous law. This is so because the total production of the local beer does not exceed 9 million gallons and has not done so for years.

Paragraph 43: Although neither the measure nor its preliminary recitals express on their face a discriminatory or protectionist intent that is unconstitutional and statutorily prohibited, in practice, it has one, without a doubt.

Paragraph 44: An examination of the legislative history, of the statements submitted before the legislature, and of the legislative debates and other public statements by the legislators, will clearly reveal that, in spite of the executive's and the legislature's initial reticence to perpetuate the discrimination created by the special exemption, neither the measure nor the budget pending approval would have obtained the necessary votes had the excessive preference proposed by this measure, with the only purpose of benefiting the local brewery, not been granted. See the statement of the Executive Vice-President of Cervecería India of April 8, 2002; the Statement of the Mayor of Mayaguez in support of the petitions for preferential treatment towards the local brewery, among others.

Paragraph 46: Article 2 of Public Law No. 69 of May 30, 2002; 13 L.P.R.A. § 4023, because of its effects and application, creates a restriction that is forbidden to interstate commerce; by promoting an irrational, restrictive, and unfair discrimination in favor of one sole local producer, and in detriment of the free flow of commerce.

Paragraph 47: The total burden of the increase – although on its face the Law appears to apply equally to Puerto Rico and United States companies – in effect falls totally on Puerto Rican distributors that sell beers manufactured in the United States, with the forbidden purpose of making the importing, marketing, and sale of United States beers more difficult.

Paragraph 50: Article 2 of Public Law No. 69 of May 30, 2002, 13 L.P.R.A. § 4023, because of its effects and application, creates a restriction that is forbidden to international commerce, by promoting an irrational, restrictive, and unfair discrimination in favor of one sole local producer, and in detriment of the free flow of commerce.

Paragraph 51: The total burden of the increase – although on its face the Law appears to apply equally to Puerto Rico and United States companies – in effect falls totally on Puerto Rican distributors that sell beers manufactured outside Puerto Rico, with the forbidden purpose of making the

importing, marketing, and sale of United States beers more difficult.

Paragraph 55: Article 2 of Public Law No. 69 of May 30, 2002, 13 L.P.R.A. § 4023, because of its effects and application, as previously argued, violates the clear and transparent provisions of Article 3 of the Federal Relations Act.

Although the arguments transcribed above are not a model of perfection, a simple perusal is sufficient to note that they may be considered to be well made arguments for the purpose of granting the remedy requested. In fact both the court of instance and the intermediate appellate court went on to analyze the essential arguments made by the petitioners and finally found that they lacked merit.

Let us now evaluate the validity of the principal argument of the petitioners, that *Article 2 of Public Law No. 69 of May 30, 2002, discriminates against interstate and international commerce and therefore violates the Interstate Commerce Clause or Section 3 of the Federal Relations Act.*

B

The Constitution of the Commonwealth of Puerto Rico provides that "the power of the Commonwealth of Puerto Rico to levy and collect taxes and to authorize their imposition and collection by municipalities shall be exercised as determined by the Legislature and shall never be surrendered or suspended." 1

L.P.R.A. Art. VI, § 2. Said taxing authority is fundamental to the life of the State and, therefore, the government's fiscal authority is constitutionally broad and encompassing. *Cafe Rico, Inc.* v. *Municipio de Mayaguez,* 155 D.P.R. 548 (2001); *Continental Insurance Company* v. *Secretario de Hacienda,* 154 D.P.R. 146 (2001); *F.D.I.C.* v. *Mun. de San Juan,* 134 D.P.R. 385 (1993); *Coca-Cola Bottling* v. *Srio. de Hacienda,* 112 D.P.R. 707 (1982); *U.S. Brewers Association* v. *Secretario de Hacienda,* 109 D.P.R. 456 (1980).

Nevertheless, the aforementioned broad authority gives way before constitutional or other types of limitations. One of these limitations is established by Section 3 of the Federal Relations Act, 1 L.P.R.A, which in its relevant part states as follows:

> " . . . the internal revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such Legislature may direct, on the articles subject to said tax, as soon as they are manufactured, sold, used, or brought into the Island; Provided, *that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico . . .* " (Emphasis provided).

Likewise, the Interstate Commerce Clause of the Constitution of the United States establishes that:

> Congress shall have Power to impose and collect Taxes, Duties, tariffs, and Excise taxes . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . Art. I Sec. 8 Constitution of the United States of America, 1 L.P.R.A.

The purpose of this constitutional principle was to grant to Congress the power to regulate both interstate and international commerce. Therefore, it has been said that it is the principal source of congressional powers. Laurence H. Tribe, *I American Constitutional Law,* 3d Ed., New York, Foundation Press, 2000 pp. 801-808.

On the other hand, and in spite of the fact that the Constitution of the United States nowhere limits State interference with interstate commerce,[7] since 1852 the Supreme Court of the United States has interpreted that the Commerce Clause also contains an implicit limitation to the power of the States to regulate interstate and international commerce, even in the absence of express federal legislation in this respect. See, *Cooley* v. *Board of Wardens,* 53 U.S. 299 (1852); Tribe, op cit. This aspect of the Commerce Clause is called the "dormant or negative aspect". *United States* v. *South-Eastern Underwriters Ass'n.,* 322 U.S. 533, 552 (1944); *Southern Pacific Co.* v.

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[7] Tribe, *op. cit.,* p. 1029.

Arizona, 325 U.S. 761 (1965). This negative aspect prevents the States from risking the welfare of the Nation "by plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." (Quotations omitted.) *Am. Trucking Ass'ns* v. *Mich PSC,* 545 U.S. 429 (2005).

With respect to the application of the Commerce Clause in our jurisdiction, this court has stated, both before and after the approval of our Constitution that said clause is not applicable to the Commonwealth of Puerto Rico. *Ballester Hnos.* v. *Tribunal de Contribuciones,* 66 D.P.R. 460 (1946); *R.C.A.* v. *Gobierno de la Capital,* 91 D.P.R. 416 (1964); *South Puerto Rico Sugar Corporation* v. *Comisión de Servicio Publico,* 93 D.P.R. 12 (1966). Some of the arguments we have outlined to reach this conclusion are, the Unincorporated Territory status of Puerto Rico before the Constitution was approved, and the different profiles assumed in the commercial relations between Puerto Rico and the United States and among the States of the United States.

In spite of the above, *in the more recent decisions we have distanced ourselves from this position and have noted that this controversy has not been fully resolved.*[8] Specifically in *Marketing and Brokerage*

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[8] It should be noted that in *South P.R. Sugar Corp.* v. *Comisión de Servicio Publico de Puerto Rico,* 93 D.P.R. 12 (1966), we indicated that the tariff imposed by the Commission was

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Specialists, Inc. v. *Secretario de Agricultura,* 118 D.P.R. 319 (1987), we indicated that at this time it was not necessary to determine if the Interstate Commerce Clause in its "dormant state" applied to Puerto Rico. Likewise, in *Gómez Hermanos* v. *Secretario de Hacienda,* 114 D.P.R. 367 (1983), to determine the validity of a local tax, we used the requirements that the federal case law had adopted to evaluate the origin of State tax laws given the Commerce Clause. Finally, in *Banco Popular* v. *Mun. de Mayaguez,* 126 D.P.R. 653 (1990), although we did not solve the controversy using the analysis created for the "dormant aspect" of the Commerce Clause, *we did describe a part of it as if it were fully applicable in our jurisdiction to the point that we indicated that the law challenged therein could be unconstitutional based on said analysis.*[9]

The case herein gives us an opportunity to resolve definitely the *question regarding whether the Commerce Clause, in its "dormant state", is applicable to Puerto Rico.* Therefore, before going on to discuss the merits of the arguments of the petitioners in the present case we will discuss the aforementioned question. Let us see.

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valid even if the Interstate Commerce Clause was applicable to Puerto Rico in the same way as to the States of the Union.

[9] In spite of that, the validity of the challenged law was upheld based on a reasonable interpretation that rectified the possible defects it could have. See, *Banco Popular* v. *Mun. de Mayaguez, ante.*

i

An exhaustive study of case law – both local and federal – and of constitutional legal scholars shows that the foregoing question has not been widely discussed and, therefore, there is a scarcity of legal sources to help us solve it. However, it arises from existing sources that with the passage of time several arguments have been outlined in favor and against the application of the Commerce Clause to our jurisdiction.

Among the more convincing arguments *against* its application are that: 1) The Constitution of the United States in full has never applied to Puerto Rico because it has never been considered a State; 2) the relationship between Puerto Rico and the United States, since 1952 is unique, therefore, Puerto Rico cannot be catalogued either as a State or as a Unincorporated Territory as regards the foregoing clause; 3) neither in the Constitution of Puerto Rico or in Public Law No. 600, or in the Federal Relations Act, is it established that said clause would apply to Puerto Rico, and, therefore, it was not a part of the pact between the United States and Puerto Rico. See, *Sancho* v. *Bacardi Corp.*, 109 F.2d 57 (1st Cir. 1940) (repealed for other reasons in *Bacardí Corp.* v. *Domenech,* 311 U.S. 150 (1940); *Mora* v. *Torres,* 113 F. Supp. 309 (P.R. Dist. 1953); *R.C.A.* v. *Gobierno de la Capital, ante.*

On the other hand, the most persuasive arguments in favor of the application of the Commerce

Clause to Puerto Rico are: 1) that it applies to Puerto Rico through the Territorial Clause; 2) that the intention of Congress in allowing the approval of the Constitution of the Commonwealth of Puerto Rico was to organize a local government, and, therefore, its adoption never altered the applicability of U.S. Laws and federal jurisdiction to Puerto Rico; 3) the broad powers of Congress to regulate commerce in general, including that of Puerto Rico; 4) the clear applicability to Puerto Rico of the principle of uniform commerce and common market. See *Starlight Sugar Inc.* v. *Soto,* 253 F 3d 137 (1st Cir. 2001); *Sea Land* v. *Municipality of San Juan,* 505 F. Supp. 533 (P.R. Dist. 1980); Raul Serrano Geyls, *Derecho Constitucional de Estados Unidos y Puerto Rico,* Vol. I, Continuing Education Program of the Universidad Interamericana de Puerto Rico, San Juan, Puerto Rico, 1992, p. 341.[10]

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[10] With the passage of time, the controversy regarding this matter has limited itself to the possible application of the dormant aspect of the Commerce Clause, and the controversy regarding the application of the Commerce Act with respect to the power of Congress to regulate interstate commerce has been set aside. As to that, we find the following expressions of the First Circuit Court of Appeals in *Trailer Marine Transport Corp.* v. *Rivera Vazquez,* 977 F 2d 1 (1st Cir. 1992) to be extremely relevant:

> "Both the Supreme Court and this court have long held or assumed that Congress has power under the Commerce Clause to regulate commerce with Puerto Rico. See *Secretary of Agric.* v. *Central Roig Refining Co.,* 388 U.S. 604, 616 (1950) (Sugar Act of 1948 applied

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Most of the foregoing arguments have their origin in several decisions of the U.S. District Court for the District of Puerto Rico and of the First Court of Appeals. At the beginning, both courts had determined that the Commerce Clause did *not* apply to Puerto Rico. *Mora* v. *Torres, ante, Buscaglia* v. *Ballester,* 162 F. 2d 805 (1st Cir. 1947) and *Lugo* v. *Suazo,* 59 F. 2d 386 (1st Cir. 1932). Subsequently, these courts *changed their mind* and decided that *it was fully applicable to the Commonwealth of Puerto Rico.*

The first case that decided in favor of the application of the foregoing clause was *Sea Land Services, Inc.* v. *San Juan,* 505 F. Supp. 533 (1980). On that occasion, the U.S. District Court of Puerto Rico concluded that the authority granted to Congress through the Territorial Clause[11] meant that the Commerce Clause was applicable to Puerto Rico *both in the positive aspect and the dormant aspect.* The court added that the reasons that led the constituents to approve the Commerce Clause are equally applicable to commercial relations between Puerto Rico and

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to Puerto Rico through the Commerce Clause); *Puerto Rico Tel. Co.* v. *F.C.C.,* 553 F.2d 694, 701 (1st Cir. 1977) (Federal Communications Commission regulations applied via the Commerce Clause to government-owed telephone company in Puerto Rico). Thus, in one aspect, the question "whether the Commerce Clause applies to Puerto Rico has been settled in the affirmative for many years . . . "

[11] Article IV, Sect. 3 of the Constitution of the United States.

the States or foreign countries and to resolve that the aforementioned clause does not apply to Puerto Rico would provoke rivalries with the States and prevent regulatory uniformity in cases where Congress might deem it relevant.

In spite of the previous determination, it was not until 1992 that the First Circuit Court of Appeals had the opportunity to change its pronouncements in *Buscaglia* v. *Ballester, ante,* and *Lugo* v. *Suazo, ante,* among others, regarding the non-applicability of the Commerce Clause to Puerto Rico. Said opportunity arose in *Trailer Marine Transport Corp.* v. *Rivera Vazquez,* 977 F 2d 1 (1st Cir. 1992), in which the foregoing court indicated among other things that:

> "*Puerto Rico today certainly has sufficient actual autonomy to justify treating it as a public entity distinct from Congress and subject to the dormant Commerce Clause doctrine.* In the Supreme Court's words, 'the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union . . . ' *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 594, 96 S.Ct. 2264, 49 L.Ed. 2d 65 (1976)". (Emphasis supplied).

This court *also* stated:

> "The central rationale of this dormant Commerce Clause doctrine, as the Supreme Court has explained, is the dominant purpose of the Commerce Clause to foster economic

> integration and prevent local interference with the flow of the nation's commerce. *This rationale applies with equal force to official actions of Puerto Rico. Full economic integration is as important to Puerto Rico as to any state in the Union.* In a different context, the Supreme Court has flatly rejected the notion that Puerto Rico may erect an 'intermediate boundary' separating it from the rest of the country. There is no reason to believe that Congress intended to authorize Puerto Rico to restrict or discriminate against cross-border trade and ample reason to believe otherwise." (Omitted quotations) (Emphasis supplied).

To reach this decision, the First Circuit also based itself on case law pronouncements made by other Circuits. Among them, that made by the Ninth Circuit in *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (1951), in which it was determined that the dormant Commerce Clause doctrine was applicable to the then territory of Alaska and that of the Third Circuit in *JDS Realty Corp.* v. *Government of Virgin Islands,* 824 F. 2d 256, 259-60 (1987), which did the same thing for the current territory of the Virgin Island.

As to those decisions – those relative to Alaska and the Virgin Island – we must underscore, beyond the differences between the type of relationship they have with the United States as compared to Puerto Rico, the language contained in Anderson, in the sense that:

> "But we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce. The words 'all rightful subjects of legislation' describing the extent to which the legislative power of the Territory should extend, 48 U.S.C.A. 77, do not include the imposition upon commerce such as that here involved of burdens which a State might not create under like circumstances. 'All rightful subjects of legislation' must be held to refer to matters local to Alaska." *Anderson* v. *Mullaney, ante*, p. 128.

In subsequent decisions, the First Circuit of Appeals has reiterated, with no further explanations, the applicability of the Commerce Clause to Puerto Rico. To such effects, see, *United Egg Producers,* et al. v. *Department of Agriculture,* 77 F. 3d 567 (1st Cir. 1996); *Starlight Sugar, Inc. v. Soto, ante.* Finally, it must be noted that as recently as April 2005, the above federal court resolved the case *Walgreens Co.,* v. *Rullan,* 405 F. 3d 50 (1st Cir. 2005), where it *reiterated* this decision when it determined that a local law requiring certificate of necessity and convenience from any person interested in acquiring or building a health establishment on the Island – including pharmacies – violated the dormant aspect of the Commerce Clause of the Constitution of the United States and was, therefore, invalid. Said decision was appealed, through petition for certiorari before the United States Supreme Court on November 4, 2005.

Subsequently, on January 9, 2006, the Supreme Court *denied* the requested appeal. See, *Perez Perdomo* v. *Walgreen Co.,* 126 S. Ct. 1059, 163 L.Ed. 2d 928 (2006).

Certainly, all the foregoing arguments are highly persuasive and include political aspects that should be resolved in a forum other than the courts. However, we believe that, given the particular circumstances of our relationship with the United States, *the arguments in favor of the application to Puerto Rico of the Commerce Clause, in its dormant state, are more persuasive than those against it.*

First, it is an undisputable fact that the relationship of Puerto Rico and the United States is *sui generis*[12] – that it cannot be catalogued as Incorporated Territory or Unincorporated Territory – and that whatever the relationship, Congress has the authority through the Territorial Clause – to regulate both interstate and international commerce in Puerto Rico. Based on the above, it would be incorrect to address the controversy regarding the applicability of the dormant aspect of the Commerce Clause to our jurisdiction under the simple assertion that the Commerce Clause does not apply, on its own merits, to Unincorporated Territories.

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[12] *Califano* v. *Torres,* 435 U.S. 1 (1978); *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976).

Thus, although there is a special and unique relationship between the United States and Puerto Rico, there should be *no* doubt that in terms of the self-governing powers granted to them, the Commonwealth of Puerto Rico and the States of the Union are extremely similar. See, *Examining Bd. of Eng'rs* v. *Flores de Otero, ante*, p. 595 and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974). *Certainly, Puerto Rico is not a country or an independent territory and cannot have the freedom to pass laws that upset the stability of interstate commerce.* See, *Trailer Marine Transport Corp.* v. *Rivera Vazquez, ante.*

In addition to the above, we believe that there are other arguments to support with equal forcefulness the application of the dormant aspect of the Commerce Clause in our jurisdiction. To such effects, we emphasize the expressions of the First Circuit Court of Appeals in *Trailer Marine Transport Corp. v. Rivera Vazquez, ante,* relative to the fact that full-economic integration – the *fundamental purpose of the Commerce Clause* – is as essential to Puerto Rico as to any State of the Union. In other words, there is *no* valid judicial reason to support – in the absence of federal legislation – the right of Puerto Rico to discriminate against the products of other States or foreign products, in order to benefit their own.

Certainly, there should be no doubt in anyone's mind that – at least in commercial aspects – the United States have broad powers to avoid what the Supreme Court of the United States has denominated

" . . . the tendencies toward economic Balkanization that has plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm* v. *Heald,* 544 U.S. 460, 472 (2005), quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979).

Finally, in the absence of an express provision excluding Puerto Rico from the application of the dormant aspect of the Commerce Clause,[13] there is *no* reason to believe that Congress authorized Puerto Rico to discriminate against interstate and international commerce. Equally, it would be risky to uphold the contrary when the Federal Relations Act has a provision preventing the Legislature of the Commonwealth of Puerto Rico from establishing " . . . *any distinction between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico* . . . " Section 3 of the Federal Relations Act, *ante.*

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[13] The only reference to the exclusion of Puerto Rico with respect to any legislation relative to interstate commerce is in Section 38 of the Federal Relations Act that provides that the Interstate Commerce Clause will not be applicable to Puerto Rico. However, said article cannot prohibit more that what it expressly provides, and therefore it cannot be granted the capacity to prevent the application in our jurisdiction of a constitutional provision like the Interstate Commerce Clause. For similar expressions, see *Sea Land* v. *Municipality of San Juan ante,* quoting Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to the Commonwealth of Puerto Rico?* 39 Rev. Jur. U.P.R. 169 (1969).

In view of the above, *it is our belief that the dormant state doctrine of the Commerce Clause of the Constitution of the United States applies to the Commonwealth of Puerto Rico as determined by the Supreme Court of the United States.*

C

Now then, having stated the above, we must now ask ourselves what analysis is required in the face of a violation of this doctrine.

As previously mentioned, the dormant or negative aspect of the Commerce Clause prevents a State from passing laws that affect interstate or international commerce to the detriment of foreign products or to benefit local products – even in the absence of related federal legislation. In other words, and as expressed by the Supreme Court of the United States, "[t]he negative or dormant implication of the Commerce Clause prohibits state [. . .] regulation [. . .] that discriminates against or unduly burdens interstate commerce and there by 'imped[es] free private trade in the national marketplace'" *General Motors, Corp.*, v. *Roger W. Tracy,* 519 U.S. 278 (1997). (Quotations omitted).

As pointed out by well-known scholars Rotunda and Nowak, the dormant aspect of the Commerce Clause seeks to prevent the States from imposing economically protectionist measures. They also indicate that it is irrelevant whether the advantage is to local merchants or to local consumers and that

both situations violate the negative aspect of the Commerce Clause. Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law,* West Group 3rd Ed., Bol. 2 Sect. 11.1 p. 133 (1999).

The current focus of the Supreme Court of the United States, according to the well-known scholar Laurence H. Tribe, is directed at giving more emphasis to the question regarding whether the statute in controversy discriminates against interstate or international commerce. Laurence H. Tribe, *op cit.* p. 1059. Thus, a State law that discriminates against interstate commerce, whether on its face or because of its effects, will be invalidated unless the State can show that the statute has a legitimate local purpose and that said purpose cannot be achieved with non-discriminatory measures. *Ibid.*

Now then an Act that is not discriminatory on its face or because of its effects, but which indirectly affects interstate commerce can be invalidated if the burden of this tax on commerce is clearly excessive in relation to the putative local benefits. *Oregon Waste Sys.* v. *Dept. of Envtl. Quality,* 511 U.S. 93, 99 (1994)[14].

With respect to the specific aspect of State tax legislation, the Supreme Court of the United States has established a *cardinal rule,* consistent with the Commerce Clause that provides that no State may

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[14] "[. . .] the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

impose a tax that discriminates against interstate commerce by providing a direct commercial advantage to local companies. *Bacchus Imports* v. *Diaz,* 468 U.S. 263, 268 (1984) quoting *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 329 (1977) and *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458 (1959).

With the passing of time, the doctrine regarding the analysis of the foregoing State laws has been expressed as follows: a State tax – facing a challenge based on the Commerce Clause – will be considered valid if: 1) there is a substantial link between the activity subject to taxation and the State that imposes it; 2) the tax is equally or proportionally distributed; 3) *the tax in question does not discriminate against interstate commerce*[15]; 4) the tax is, adequately related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274

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[15] This third element has been analyzed according to the traditional approach used when a law is challenged for allegedly violating the dormant aspect of the Interstate Commerce Clause. Tribe, op. cit., p. 1106. That is, a State law that discriminates against interstate or international commerce – whether on its face or because of its effects – is virtually invalid or invalid *per se. Chemical Waste Management* v. *Hunt,* 504 U.S. 334 (1992); *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.,* 476 U.S. 573 (1986); *Pike* v. *Bruce Church. Inc.* 397 U.S. 137 (1970). See also, Tribe, *op cit.* p. 1059.

(1977); see, also, *Iberia* v. *Secretario de Hacienda,* 135 D.P.R. 57 (1993).[16]

As to said criteria, it has been held that *the third requirement is dominant,* and both the first and the fourth are meant to show that the State has sufficient relation to the activity it proposes to tax. Finally, the second criterion is meant to make sure that the taxes do not obligate interstate commerce to pay more that what corresponds to it. Tribe, *op cit.* p. 1106-07.

D

After describing the rule of law regarding the dormant aspect of the Commerce Clause, we now go on to jointly analyze findings of error two and three. Essentially, the petitioners argue that Article 2 of Public Law No. 69, *ante,* discriminates against interstate commerce both in terms of its purpose and because of its effects and, therefore, violates the Commerce Clause and Section 3 of the Federal Relations Act.

In the first place we must resolve, without further analysis, the possible argument that Public Law No. 69, *ante,* challenged herein is discriminatory on its face, *emphasizing* that in the sworn petition submitted before the primary court, the very petitioners admit that the aforementioned Law is *not*

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[16] This test also incorporates due process requirements. See, Tribe, *op cit.* p. 1106.

discriminatory. Likewise, we point out that in the case herein, there is no dispute in the sense that the challenged law applies equally to local, State, or international companies, since the companies mentioned must pay a tax that will depend on their *volume of production,* regardless of their place of origin.

In spite of this, the petitioners argue that both the primary court and the intermediate appellate court erred because they did not use the legislative history of Public Law No. 69, *ante,* to determine that the measure had a *discriminatory purpose* or, in other words, that it was discriminatory on its face.

Regarding this position, it must be pointed out that on several occasions we have resolved that "if [a] law lacks preliminary recitals, or if having them, they *do not include the legislative intent,* it is useful to consult other documents such as the reports of the commissions that studied the bill of law and the debates held when the measure was discussed on the floor, as they appear in the Legislative Diary." *Vicenti Damiani* v. *Saldaña Atha,* 157 D.P.R. 38 (2002); *Chevere* v. *Levis Goldstein,* 150 D.P.R. 525 (2000). In other words, *the norm as to how the legislative intent of a statute should be analyzed* is to look for it in the preliminary recitals, and only when there are no preliminary recitals, or when the *legislative intent is not stated there,* may other documents be consulted.

And it cannot be otherwise, since interpreting the legislative intent of a law based on documents other

than the preliminary recitals – when such intent is contained therein – would be to affirm *sub-silentio* that the legislature "says one thing, but means another." Equally, it is not the same thing to interpret a statute in order to be able to apply it, than to interpret the statute in order to determine the legislator's intent when he approved it. As to said alternative, the following expressions of the Supreme Court of the United States are revealing:

> "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.* We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it." (Emphasis supplied) *United States* v. *O'Brien,* 391 U.S. 367, 383-384 (1968).

This court has made similar statements regarding the use of the statements of the legislators during the legislative debate when interpreting a law. To such ends, we have stated that: "it is a generally accepted rule that the statements of a legislator on the floor of the legislative body to which he belongs, are not sufficiently representative of the collective intent of the body that approves the statute." *Vazquez* v. *Secretario de Hacienda,* 103 D.P.R. 388, 390 (1975). In addition it has been reiterated that the laws "must be interpreted based on what the Legislature did, and not on the basis of what it failed to do, or on the individual actions of one of its members." *Elicier* v. *Sucesion Cautifio,* 70 D.P.R. 432, 437 (1949).

Having said the above, we analyzed the preliminary recitals of Public Law No. 69, *ante,* to determine if it is necessary to find other elements to establish the intent of the legislators when they passed it. The foregoing preliminary recitals in its relevant part provides as follows:

> "The tax measures established by this measure should not affect other areas of the country's economic base. For this reason, in the case of beer, the mechanism endorsed by the Supreme Court of Puerto Rico in U.S. *Brewers Association v. Secretario de Hacienda,* 103 D.P.R. 456 (1980), is used to guarantee that the industries that produce less can continue to operate unchanged. In such cases, as its productive capacity increases, and as a result, its financial stability, its responsibility to the treasury increases. In the

> face of this, *it is the public policy of the Commonwealth of Puerto Rico to ensure that small breweries do not receive the burden of the new excise tax increase until their annual production and financial capacity justify it* . . . " (Emphasis supplied).

An analysis of the text quoted above, shows clearly and transparently that the intent of the Legislature when it passed said Act was to approve a new excise tax while guaranteeing, on the other hand, that small breweries could continue to operate without receiving the burden of the tax until their annual production justified it. Let us remember, "when the law is clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of fulfilling the spirit thereof." Article 14 of the Civil Code, 31 L.P.R.A. § 14; *E.L.A.* v *Rodriguez Santana,* res. of February 24, 2005, 2005 TSPR 13.

In accordance with the above, we believe that the Court of First Instance and the Court of Appeals *acted correctly* when they resolved that the Legislative intention that led to the passing of Public Law No. 69 is *not* discriminatory on its face, since it clearly arises from its preliminary recitals. Likewise, and contrary to the arguments of the petitioners, we believe that to arrive at this conclusion it was *not* necessary to examine the expressions of several legislators during the legislative debate process.

On the other hand, the petitioners hold that the challenged law has a *discriminatory effect* on interstate commerce. They base their argument on *Bacchus*

Imports v. *Diaz, ante,* a case in which the Supreme Court of the United States voided a law of the State of Hawaii that established a tax on alcoholic beverages with the sole exceptions of two beverages produced only in that state.[17]

In examining the purpose of the aforementioned legislation, the Supreme Court of the United States stated that "examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." *Ibid.* p. 270. Regardless of the above, the principal federal court stated that: "Likewise, the effect of the exemption is clearly discriminatory, in that *it applies only to locally produced beverages, even though it does not apply to all such products.* Consequently, as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect." *Ibid*, p. 271.

As may be appreciated from the above, the Supreme Court of the United States declared that the challenged law was unconstitutional on its face – in its purpose – and because of its effects. It is based on the former that the petitioners outline their argument that Public Law No. 69, *ante*, is discriminatory

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[17] These beverages were Okolehao, a drink manufactured from the root of a native Hawaiian plant, and fruit wines.

because of its effects. However, we believe that the decision in *Bacchus, ante,* regarding the discriminatory effects of the law is *not* applicable to the present case.

First, the laws involved in both cases are *clearly different.* While *Bacchus, ante,* attempted to protect the Hawaiian liquor industry exclusively by exempting from the application of the tax several beverages that were produced only in Hawaii, the case in caption attempts to guarantee that the industries that produce less – *regardless of their place of origin* – may absorb the tax imposed without ceasing operations. It arises from the very law that in order to comply with this purpose the Legislature of Puerto Rico established a staggered tax exemptions system that attempts to allow the companies' liability to the treasury to increase gradually as their economic stability increases.[18]

As we saw, in *Bacchus, ante,* the Supreme Court of the United States gave special emphasis to the fact that the only beverage that benefited from the exemption was the Hawaiian one, *this is not the situation of the case herein.* The record of the case before our consideration shows that *the very petitioners*

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[18] We must emphasize that the Legislature has broad discretion in the tax area and that "traditionally, 'classifications' have been a method to adjust the tax programs to local needs and uses in order to achieve an equitable distribution of the tax burden." *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante*; *Miranda* v. *Sec. de Hacienda,* 77 D.P.R. 17 (illegible), 178 (1954).

admit that there are foreign beers, such as Mike's Hard Lemonade and Cruzan Island Cocktails that benefit from the special exemption and others such as Samuel Adams and Bacardi Breezers that had been eligible or discontinued production, whereby the local beer industry is not the only one benefiting from the exemptions offered by said statutes.

In addition, it is an undisputed fact that the approved exemptions apply and may apply equally to local, State or foreign breweries allowing the tax level to vary *depending on their annual production.* That is, a brewery that is benefiting today from some of the exemptions imposed, may benefit the following year from a smaller exemption or none, depending on changes in production. Likewise, it would not be risky to affirm that small foreign breweries may take advantage of the aforementioned benefit if they should decide to sell their products in Puerto Rico.

In other words, resolving that the effect of Article 2 of Public Law No. 69, *ante*, is discriminatory against interstate commerce requires a determination that said law has the effect of prohibiting entities outside Puerto Rico from taking advantage of its benefits, which as we have seen is not correct.

Likewise, although it is true that the Commerce Clause in its dormant state prohibits the States from passing financial laws that discriminate against foreign products for reason of origin, we cannot affirm that said clause prohibits a State from passing a law that, in technical terms, applies differently to several

products or manufacturers. Of course, that will be so as long as said difference has nothing to do with the place of origin of the products, but rather with common or neutral aspects that may vary from company to company regardless of their place of origin. In this regard the following statements of the Supreme Court of the United States are relevant: "[T]he Commerce Clause *is not violated* when the differential treatment of two categories of companies *results solely from differences between the nature of their business,* not from the location of their activities." *Kraft General Foods. Inc.* v. *Iowa Department of Revenue and Finance,* 505 U.S. 71, 78 (1992).

For said reasons, we believe that Article 2 of Public Law No. 69, *ante, does not discriminate against interstate commerce,* because of its application or effects. Now, our analysis does *not* end here. As previously mentioned, the state tax laws, in addition to not being discriminatory, must comply with other criteria to survive a challenge under the Commerce Clause. These criteria are: 1) the tax applies to some activity that has a substantial link to the State; 2) the tax is fairly distributed; and 3) it is appropriately related to the services provided by the State.

The petitioners have outlined no argument directed to showing that Article 2 of Public Law No. 69, *ante*, does not comply with some of the aforementioned criteria. Notwithstanding the above, it is clear that the tax established by Public Law No – 69 – and, therefore, the challenged exemption – applies to an activity with substantial links to Puerto Rico and is

related to services provided by it, that is, the authorization to sell alcoholic beers in our jurisdiction. In addition, it is fairly distributed because the exemption diminishes as the company produces more.

Finally, we must mention that when a State law imposing a tax for allegedly discriminating against *international* commerce is challenged the following criteria must also be analyzed: 1) "whether the tax notwithstanding apportionment, creates a substantial risk of international multiple taxation"; and 2) "whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.* v. *County of Los Angeles,* 441, U.S. 434, 451 (1979).

As to the first criterion, the Supreme Court of the United States has indicated that a State tax will be validated unless there is an unavoidable risk of double taxation. *Barclays Bank PLC* v. *Franchise Tax Board,* 512 U.S. 298 (1994); *Container Corp. of America* v. *Franchise Tax Board,* 463 U.S. 159 (1983). It is obvious that the tax that gives rise to the exemption challenged herein *does not* pose the risk of double taxation, since it falls only on beverages sold in Puerto Rico.

As to the second criterion, it intends to prevent the distortion of the Congressional interest to establish uniformity in commercial relations with other countries. Said criterion presupposes that Congress has clearly stated its intent to create the aforementioned

uniformity. *Barclays Bank PLC* v. *Franchise Tax Board, ante,* In the present *case* there is no Congressional intent to maintain the aforementioned uniformity and, in addition, there are a number of States with different laws that impose different taxes on beers and other beverages.[19]

We believe, we repeat, that Article 2 of Public Law No. 69, *ante, does not* violate the Interstate Commerce Clause, because it: 1) does not have a discriminatory purpose; 2) does not have a discriminatory effect; 3) applies to an activity that has a substantial link to Puerto Rico; 4) is fairly distributed; 5) is adequately related to services offered by the State; 6) does not constitute a substantial risk of multiple taxation; and 7) does not affect any possible interest of the U.S. government to maintain uniformity with international commerce.[20] To conclude, we

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[19] See as example: Wyo Stat. § 12-3-101 (Wyoming; W. VA. Stat. § 11-16-13 (West Virginia); 72 P. S. § (illegible) (Pennsylvania; N.M. Stat. Ann. § 7-17-2 (New Mexico); Wis. Stat. § 139.02(1) (Wisconsin); and Tex. Alco. Bev. Code § 203.01 (Texas).

[20] The petitioners also argued that Article 2 of Public Law No. 69, *ante,* violates Section 3 of the Federal Relations Act, *ante.* Certainly, given our opinion with regard to the Commerce Clause, *it is unnecessary to address this argument, since the analysis required by the Commerce Clause is, at least, more strict than that required by Section 3 of the Federal Relations Act, ante.* Thus, we believe that an Act that survives the analysis required by the Commerce Clause – as is the case of Article 2 of Public Law No.69, *ante* will necessarily survive a challenge under Section 3 of the Federal Relations Act.

believe that both the Court of First Instance and the Court of Appeals acted correctly when they dismissed the sworn petition that gave rise to the case in caption.

For all of the above, we *concur* with the Judgment issued by the Court in the present case.

[Illegible signature]
FRANCISCO REBOLLO LOPEZ
Associate Judge

[Translators Note: All pages except the last, left margin, one set of initials – FRL]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Sonia Crescioni of legal age, single, resident of San Juan, P.R., professional interpreter/translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally revised the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities

In San Juan, Puerto Rico, today, June 29, 2007.

/s/ Sonia Crescioni
Sonia Crescioni
ATABEX TRANSLATION SPECIALISTS, Inc.
P.O. Box 195044, San Juan, PR 00919-5044

Commonwealth Of Puerto Rico
IN THE CIRCUIT COURT OF APPEALS
SAN JUAN REGIONAL CIRCUIT
PANEL I

ASOCIACION PUERTORRIQUENA DE IMPORTADORES DE CERVEZA, INC.; HEINEKEN BROUWERIJEN B.V.; V. SUAREZ & CO., INC.; MENDEZ & CO., INC.; B. FERNANDEZ & HNOS., INC.; BALLESTER HERMANOS, INC. Appellants v. ESTADO LIBRE ASOCIADO DE PUERTO RICO; JOSE A. FLORES GALARZA, in his official capacity as SECRETARY OF THE TREASURY; CERVECERIA INDIA, INC.; CC1 BEER DISTRIBUTORS, INC. Appellees	KLAN0201085	Appeal from the Court of First Instance Superior Court of San Juan Civil No.: KPE2002-1282 Declaratory Judgment and Petition for Preliminary and Injunction

Panel composed of its president, Judge Fiol Matta, and Judges González Rivera and Rivera Martínez.

Rivera Martínez, Judge Delivering the Opinion of the Court.

JUDGMENT

In San Juan, Puerto Rico, August 18, 2003.

An appeal has been submitted by the Puerto Rican Association of Beer Importers, Inc., et al, for our consideration. The appeal requests review of the judgment issued by the Court of First Instance on August 16, 2002, in the case of *Asociación de Importadores de Cerveza, Inc., et al, v. Estado Libre Asociado de Puerto Rico, et al,* Civil No. KPE2002-1282. A copy of the notice of the judgment was filed in the records of the court on August 20, 2002. It should be noted that on September 12, 2002, the Court of First Instance issued an amended notice since the original notice had not been sent to the attorneys of all the parties.

In the said judgment, the appeals court dismissed the sworn petition submitted by the appellants, in which they requested a decree of unconstitutionality regarding Article 2 of Public Law No. 69 of May 30, 2002, since it allegedly violates section 3 of the Federal Relations Act (48 U.S.C. Sec. 741a) 1 L.P.R.A. Federal Relations Act, Sec. 3 and the Commerce Clause of the Constitution of the United States of America, Art. 1 Section 8. With this decision, the

Court of First Instance held for the tax schedule designed by the Legislature in virtue of said statute, since it understood that the intent or effect of the tax schedule was not to obstruct interstate or international commerce.

On August 30, 2002, the appellants requested reconsideration of the judgment in question, to which the appealing co-defendants, the Commonwealth of Puerto Rico and Juan Flores Galarza, the Secretary of the Treasury, were opposed. The term for the Court of First Instance to address the request expired and, nothing was decided with respect to this matter.

After considering the briefs submitted by the parties, as well as the controversies involved in the case, we have resolved to confirm the appealed judgment. Let us see.

I

Public Law 69, *supra,* was created, as we mentioned before, on May 30, 2002. This law amended Sections 4002 and 4023 of Public Law No. 120 of October 31, 1994, as amended, better known as the Puerto Rico Internal Revenue Code of 1994. The purpose of this law was to increase the taxes applicable to distilled spirits, wines and beers.

However, Article 2 of the law in question is the one being questioned in this lawsuit. The law amended Section 4023 of the Internal Revenue Code, 13 L.P.R.A., Sec. 9574, which sets a lower tax on

beers produced or manufactured "by persons whose total production, if any, of said products during their most recent tax year has not exceeded thirty-one million (31,000,000) gallons measured.[1] This body of law took effect fifteen days after it was promulgated, that is, on June 14, 2002.

To this end, on June 13, 2002, the appellants, the Puerto Rican Association of Beer Importers, Heineken Brouwerjen N.V. [sic], V. Suárez & Company, Inc., B. Fernández Hermanos, Inc., Ballester Hermanos, Inc., submitted the complaint in the present case, which they entitled "Sworn Petition" (hereinafter "the Petition"). In the Petition, the appellants allege that the special exemption provided for in Article 2 of Public Law 69 has the intent and effect of favoring beer produced in Puerto Rico, particularly Cerveza India, and of placing imported beers at a disadvantage. They thus allege that this constitutes a protectionist action that violates the interstate and International Commerce Clause of the United States Constitution, as well as Article 3 of the Federal Relations Act. Likewise, in the Petition, the plaintiffs requested that a declaratory judgment be issued, ruling that Article 2 of Public Law 69 violates the above-cited legal provisions. Also in the Petition, the

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[1] The exemption contained in Article 2 of Public Law 69, entitled "special exemption," applies to all malt extracts and other similar fermented or non-fermented products whose alcoholic content exceeds one and a half percent (1½%) by volume." See Article 2 of Public Law 69.

appellants requested that a preliminary injunction be issued "to keep the Commonwealth of Puerto Rico, through the Secretary of the Treasury, from implementing Article 2 of Public Law 69," until the lawsuit was examined on its merits. They also requested that the Secretary of the Treasury be ordered to collect taxes from all taxpayers at the same rate.

Subsequently, the appellants submitted a memorandum of law in support of the request for the preliminary injunction mentioned above. On June 25, 2002, the co-defendants against whom the appeal was made, Cervecería India, Inc., and the distributor of its beers, CC1 Beer Distributor, Inc., submitted a motion for dismissal and opposition to the request for the preliminary injunction. In that motion, they basically argued that the "principal exemption" for beer producers whose annual production does not exceed 31 million gallons, contained in Article 2 of Public Law 69, does not violate the Commerce Clause of the United States Constitution, since it does not discriminate against interstate or international commerce, not on its face, nor in its intent or effect. The motion also explained that the Supreme Court of Puerto Rico had already ruled in the case of *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R 456 (1980), that the special exemption questioned by the appellants does not violate Article 3 of the Federal Relations Act, and that, by virtue of the doctrine of *stare decisis,* the decision compels the dismissal of the cause of action based on said article.

On June 3, 2002, the co-defendants supplemented their motion for dismissal by adding, as additional grounds to support their request, that both the Anti-Injunction Act and Section 6185 of the Puerto Rico Internal Revenue Code require that the lawsuit be dismissed, as they block questioning of the validity of a tax assessment through injunction procedures or declaratory judgments. It also alleged that the absence of indispensable parties was an obstacle to issuing the provisional injunction relief requested by the appellants.

The plaintiffs opposed the motion for dismissal submitted by India and CC1 on July 8, 2002, and the one submitted by the Commonwealth of Puerto Rico and the Secretary of the Treasury on July 12, 2002.

Having received the motions for dismissal from all the defendants, as well as the corresponding opposing views and rebuttals, on July 27, 2002, the Court of First Instance dismissed the complaint by issuing the judgment here being appealed. By so doing, the Court of First Instance ruled that the abovementioned Petition did not include one single well-argued fact that would allow the court to grant the remedy requested by the plaintiffs and, as a result, to declare null and void the tax schedule designed by the legislator [sic] to benefit small breweries. On the other hand, the Court of First Instance ruled that the doctrine of *stare decisis* obligated it to rule that the special exemption does not violate the interstate commerce clause of the United States Constitution.

The Court also upheld the constitutionality of Article 2 of Public Law 69. It based its decision on the ruling of our Supreme Court in the case of *United States Brewers v. Secretario de Hacienda, supra.* It should be noted that in this case, our highest court upheld the validity of the same tax schedule in dispute here, which granted a special exemption to those small breweries, both local and foreign, whose annual production does not exceed a specific number of gallons.

Not in agreement with this ruling for dismissal of the Court of First Instance, the appealing plaintiffs submitted a motion for reconsideration of the judgment on August 30, 2002, which was opposed by both the appellees CC1-India and the Commonwealth of Puerto Rico. The request for dismissal was flatly denied and, as a result, the appellants submitted the present appeal, pointing out three points of error allegedly committed by the Court of First Instance, to wit: (1) that it erred in dismissing the Sworn Petition, without having accepted as true the statements in the complaint and, to the contrary, accepting as true statements that do not appear in the complaint, contrary to the norm for dismissal under Rule 10.2 of Civil Procedures and its jurisprudence; (2) it erred by ruling that Article 2 of Public Law 69 does not violate Section 3 of the Federal Relations Act or the Commerce Clause, mistakenly applying the case of *U.S. Brewers Asoc. v. Secretario de Hacienda,* 109 D.P.R. 456 (1980). As the third and last error, the appellants state that the Court of First Instance erred by not

admitting the proof offered on the discriminatory intent and effect of the special exemption

II

Because we understand that the first and third points of error are intimately related, and in an effort to avoid duplication in the discussion, we shall discuss the two together. Let us see.

In summary, the appellants sustain that the Court of First Instance erred by dismissing the sworn petition without having held an evidentiary hearing where they would have had the opportunity to submit evidence illustrative of the discriminatory intent of the special exemption, by not having accepted as true the "properly-alleged facts of the petition," which were allegedly intended to at sustain the claim of illegal and unconstitutional discrimination and clearly and conclusively indicate that Article 2 discriminates against imported beers, giving domestic beers a competitive advantage. They indicate that by the Court of First Instance ruling in this way, it obviated the norms that govern a motion for dismissal. They are mistaken. Let us see.

> In ruling on a motion for dismissal submitted under Rule 10.2 of the Civil Procedures, 32 L.P.R.A. App. III R. 10.2, the courts must assume that certain properly-alleged facts in the lawsuit are true. Unisys v. Ramallo Brothers, 128 D.P.R. 842 (1991); *Granados v. Rodríguez Estrada J.*#124 D.P.R. 1 (1989); *Romero Arroyo v. E.L.A.* 127 D.P.R. #724

> (1991); *Pueblo v. Rodríguez Aponte,* 116 D.P.R. 653 (1985) *First Fed. Savs. v. Asoc. de Condómines,* 114 D.P.R. 426 (1983). The movant of the motion in question is responsible for showing that, even assuming that what is expressed therein is true, the dismissal of the lawsuit is appropriate, for any of the reasons set forth in the Rule. *Pressure Vessels v. Empire Gas,* 137 D.P.R. 497 (1994). Of course, the statement of the facts must be made in a clear and convincing way, so that there is no room for doubt. *First Fed. Savs. v. Asoc. de Condómines, supra.* Moreover, the admissions made by the movant of these properly-formulated statements is [sic] solely for the purposes of the motion "and they are not final and conclusive in such a way that they constitute a waiver of any material controversy that must be determined by the evidence of the trial." *Sepúlveda v. Casanova,* 72 D.P.R. 62, 68 (1951).

However, if it is true that in adjudicating a motion for dismissal under Rule 10.2 of the Civil Procedures, *supra,* the allegations of the lawsuit must be examined freely and in a manner more favorable to the plaintiff, the allegations must constitute statements of fact and they must be properly formulated. In other words, **those allegations that are not properly formulated, that constitute conclusions of law or leave a margin of doubt, cannot be assumed to be true for the purposes of adjudicating a motion for dismissal.** *Roldán*

Rosario y otros v. Lutrón SM, Inc. 2000 J.T.S. 133; *Pressure Vessels, supra; Molina v. Supermercado Amigo, Inc.* 119 D.P.R. 330 (1987); *First Fed. Savs. v. Asoc. de Condómines, supra* (emphasis added). Nor can it be assumed that those legal conclusions, qualified as a factual allegation, are true. *Papasan v. Allain,* 92 LE 2d 209 (1986).

The allegations that the appellants list in support of their claims do not comply with the type of statement that survives a motion for dismissal under Rule 10.2 of the Civil Procedures, 32 L.P.R.A., ap. II R. 10.2. Thus, it is not because they need to be more or less specific, but rather because they are conclusions of law or speculative manifestations that suffer from leaving a margin of doubt. Let us see.

Paragraph 18 of the sworn petition states the following:

> This section aims at the annulment, on the contrary [sic] of the Federal Relations Act of Puerto Rico and the Commerce Clause of the United States Constitution, of those sections that create an exception in the tax rate in favor of a private manufacturing company in Puerto Rico, to the detriment of international and interstate commerce and the proprietary interests of other local, United States and foreign companies, which are suffering and shall continue to suffer irreparable damage. Meanwhile, this exception limits, instead of increasing, the benefits to the people of Puerto Rico that the

> legislation itself is intended to obtain, according to its statement of motives.

In the same way, paragraph 19 of the Sworn Petition states:

> In effect, and as alleged below, the legislation in question creates discrimination of such a nature that it practically eliminates the right of consumers to acquire the beer they prefer and fosters a monopoly sanctioned by the state in favor of a single producer and its exclusive distributor.

As can be seen, the above paragraphs, transcribed from the Petition, are strictly a conclusion of law, relative to a special exemption that is perpetuated by Public Law 69. As we have seen, these statements cannot be considered to invalidate a motion for dismissal since they are conclusions of law by the appellants, which this court, even treating them as true for the purpose of adjudicating a motion for dismissal under Rule 10.2 of the Civil Procedures, would find that it is not appropriate to allow same. *Roldán Rosario y otros v. Lutrón SM, Inc., supra; First Fed. Savs. v. Asoc. de Condómines, supra.*

The above is only a small sample indicating that the allegations of the appellants in the Sworn Petition, even if taken as true, led to the dismissal of the Petition. Neither are the rest of the allegations contained in the Petition worthy of allowing the motion for dismissal, since some are statements of damage that alone cannot nullify the granting of a remedy

and others are merely the appellants' finding of fact. A brief example of this are allegations 38 and 39 of the Petition, which state the following, respectively:

> 38. All the plaintiffs are affected by the legal tax, in that the special exemption is not applied to them.
>
> 39. Based on information and belief, only the local producer, Cervecería India and its distributor for Medalla Light, its principal product, shall benefit from the special exemption, that is, they are now subject to paying only the $2.15 excise tax, which would continue for them under the previous legislation. This is because the total production of the local brewery does not exceed 9 million gallons, nor has it exceeded this amount for years.

Likewise, the appellants indicate that they repeatedly offered proof to the Court of First Instance and that this court did not allow them to present it. They submitted the representation or statements of no fewer than eleven legislators as part of their offers of proof. But they are mistaken.

The so-called "offers of proof" are portions of the statements of Atty. Ana Matilde Nin, one of the attorneys for the appellants, made during the hearing held on July 23, 2002, when she listed the evidence that she would supposedly submit at an evidentiary hearing, plus sworn statements from some people who would have supposedly testified if they had been

allowed to present evidence in an evidentiary hearing.

The Court of First Instance not only examined these offers of proof, but also treated them as true, as required by the norms on motions for dismissal under Rule 10.2 of the Civil Procedures. To this end, the Court of First Instance stated that:

> In support of this request, the sworn petition refers only to two representations made by persons who are not legislators: that the of President of Cervecería India and that the of mayor of Mayagüez. In addition, on page 9 of the request for a Preliminary Injunction, the plaintiffs allude to the statements made by the legislators, without giving the context or place where the statements were made. Neither the representations mentioned nor the statements attributed to the legislators, even if true,[2] would make it possible to conclude reasonably that the unequivocal intent expressed by the legislators in the statement of motives is not the true intent of the law.
>
> The representations mentioned in paragraph 44 of the Sworn Petition are from two persons who are not legislators. The plaintiffs

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[2] The Sworn Petition does not allude to these statements [sic] or to any other legislators. Nevertheless, because of this, in considering the Motions for Dismissal, we are not obligated to assume that these statements were made, but do so for the purposes of this discussion. (Internal quote.)

> do not indicate any place in the legislative record that might even suggest that the positions assumed or the petitions made in these representations were adopted by the legislators.
>
> The statements made by the two legislators do not have a legal effect either and do not justify setting aside the letter of the law and the expression of legislative intent. Thus, "it is a generally accepted rule that the statements of a legislator on the floor of the legislative body to which he/she belongs, are not sufficiently representative of the collective intent of the body that approves the statute." *Vázquez v. Secretario de Hacienda,* 103 D.P.R. 388, 390 (1975), laws "must be interpreted on the basis of what the Legislative Assembly did, and not on the basis of what it failed to do, or on the personal actions of one of its members." *Elicier v. Sucesión Cautiño,* 70 D.P.R. 432, 437 (1949). See page 15 of the Judgment of the Court of First Instance.

However, the statement in regard to the duty of the Court of First instance to hold an evidentiary hearing to hear the arguments of the appellants is nothing more than a reiteration of its argument that it had the right to provide proof in order to demonstrate the alleged protectionist intent of the special exemption. It should be noted that the court had before it a motion for dismissal on the grounds that the lawsuit did not justify the granting of a remedy; the court, in the exercise of its discretion, has the authority to hold the hearing or to adjudicate the

motion, without it being necessary to hold a hearing to do so.

On the other hand, and as is well known, the appellants requested that Article 2 of Public Law 69 be declared illegal and unconstitutional for violating Sec. 3 of the Federal Relations Act and the Commerce Clause. To this end, they state that the only thing they had to allege was that the special exemption constitutes economic protectionism, either because its intent is protectionism or because in its effect it is discriminatory. They are mistaken. At no time can we lose sight of the type of remedy requested by the appellants, which is nothing less than a finding that a legal provision is unconstitutional and the issuing of a permanent injunction that the Secretary of the Treasury collect equal taxes from all taxpayers, without applying the special exemption provided for in Article 2 of Public Law No. 69.

III

Now, before going into the discussion of the second point of error indicated out by the appellants in the present case, we shall give a summary of the origin and background of the special exemption.

The special exemption contained in Article 4023 of the Internal Revenue Code, 13 L.P.R.A., sec. 9574, which is the one being challenged in the lawsuit in the present case, originated in Public Law No. 37 of July 13, 1978 (hereinafter, Public Law 37). In addition to increasing the tax on beer to $1.60 a gallon,

this law established the special exemption for breweries whose production during the previous tax year did not exceed thirty-one million (31,000,000) gallons. See Public Law 37, *supra; U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at page 458. The latter would pay $1.05 per gallon.

In the case of *U.S. Brewers Assoc.,* supra, the Supreme Court of Puerto Rico stated that:

> Public Law No. 37 was passed to increase the revenue produced for the public treasury by the Beverage Act. Recognizing the existence of economies of scale in beer production, the law distributes the tax burden according to the productivity of the company in order to foster competition among companies of different sizes (Internal quote omitted.)

Subsequent to the approval of Public Law No. 37, *supra,* the U.S. Brewers Association, which at that time consisted of manufacturers of 95% of the beer sold in the United States, together with several companies dedicated to the sale and production of beers, challenged the special exemption, submitting arguments similar to those presented in the present case. They basically alleged that the intent and effect of the exemption was to discriminate against foreign beers in order to benefit local beers. *U.S. Brewers Assoc. v. Secretario de Hacienda,* at page 460.

In the case of *U.S. Brewers, supra,* the plaintiffs alleged that such discrimination violated the equal

protection of the laws and Article 3 of the Federal Relations Act. *Id,* at page 459.

The Supreme Court confirmed the judgment issued by the Court of First Instance, dismissing the lawsuit and ruling that the special exemption does not violate Article 3 of the Federal Relations Act or equal protection of the law. The Supreme Court stated that the special exemption did not have a discriminatory intent, but rather the legitimate intent of "distributing the tax burden among breweries according to their potential for generating profits." *Id.* at page 461. Likewise, the Supreme Court ruled that the effect of the law was not discriminatory but, contrary to the arguments of the plaintiffs in that case, the exemption equally favored small foreign and American breweries that sold or could sell their products in Puerto Rico. *Id.* at page 461.

In this way, the Supreme Court of Puerto Rico rejected the arguments of the plaintiffs and, in so doing, refused to ignore the clear letter of the law, as well as the intent that the legislators expressed and which reinforced same. In conclusion, the Supreme Court of Puerto Rico in the case of *U.S. Brewers Association, supra,* ruled that Public Law 37 of July 13, 1978, does not violate the constitutional clause of equal protection of the law by levying different taxes on the beer produced, basing it on a reasonable classification according to the volume of the annual production of the breweries. This classification takes into consideration the valid legislative purpose of

distributing the tax burden among breweries according to their potential for generating profits.

After 1978, the provisions regarding taxes applied to beers were amended twice for the sole purpose of increasing the amount of the tax, while keeping the special exemption applicable to small breweries whose annual production does not exceed 31 million gallons. See Public Law No. 12 of June 10, 1981; Public Law No. 22 of July 14, 1989.[3]

However, the only other amendment to the provision on the tax on beers since the approval of Public Law 37 in 1978, is the one made in 2002 by Public Law 69. The statement of motives of Public Law 69 stipulates that its intent is to increase the taxes on distilled spirits, wines and beers in order to provide additional revenue for the General Fund of the Commonwealth of Puerto Rico. As for the beers, Public Law 69 increased the tax to $4.05 for each measured gallon, while Article 2 maintained the special exemption for beers produced by persons whose total production during their most recent tax year does not exceed 31,000,000. See Article 2 of Public Law 69. The only difference found in Public Law 69 is that, instead of establishing a uniform

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[3] Public Law No. 12 of June 10, 1981, increased the excise tax on beers to $1.89 and the one applicable to beers that benefited from the special exemption to $1.25. Public Law No. 22, of July 14, 1989 increased the tax on all beers an additional $.90, to $2.70, for beers with greater production, and to $2.15, for those that benefit from the special exemption.

excise tax for all breweries whose production is less than 31,000,000, as had been the case since 1978, it established a series of increases in the tax applicable to small breweries as their production increased. *Id.* In this way, the current special exemption is as follows:

> Two dollars and fifteen cents ($2.15) for each measured gallon produced in amounts up to nine million (9,000,000) measured gallons;
>
> Two dollars and thirty-six cents ($2.36) for each measured gallon produced, in amounts of more than nine million (9,000,000) but less than ten million (10,000,000) gallons;
>
> Two dollars and fifty-seven cents ($2.57) for each measured gallon produced, in amounts of ten million (10,000,000) but less than 11 million (11,000,000) gallons;
>
> Two dollars and seventy-eight cents ($2.78) for each measured gallon produced in amounts of eleven million (11,000,000) but less than twelve million (12,000,000) gallons;
>
> Two dollars and ninety-nine cents ($2.99) for each measured gallon produced in amounts of twelve million (12,000,000) but less than thirty-one million (31,000,000) gallons.

Thus, Public Law 69 essentially increased taxes per measured gallon for all the beers, without distinction of any kind, except the amount of alcohol by volume and the amount of production. Article 1 of Public Law No. 69 amended section 4002 of the P.R.

Internal Revenue code (13 L.P.R.A. Sec. 9521) by increasing the base tax for beers, as follows:

1. Prior to Public Law 69, the base tax on beers whose alcoholic content is from .5% to 1.5% by volume was $0.40 per measured gallon, or a proportional amount per fraction. After the approval of Public Law 69, the base tax on these beers increased to $0.70 per measured gallon, or a proportional amount per fraction.

2. Prior to Public Law 69, the base tax on beers whose alcoholic content exceeds 1.5% by volume, was $2.70 per measured gallon, or a proportional amount per fraction. After the approval of Public Law 69, the base tax on these beers increased to $4.05 per measured gallon, or a proportional amount per fraction.

3. Prior to Public Law 69, the base tax on beers whose alcoholic content exceeds 1.5% by volume and is sold in 5 or more measured-gallon containers, was $2.75 per measured gallon, or a proportional amount per fraction. After the approval of Public Law 69, the base tax increased to $4.12 per measured gallon, or a proportional amount per fraction.

Article 2 of Public Law No. 69, in turn, amended section 4023 of the P.R. Internal Revenue Code (13 L.P.R.A. Sec. 9574) in order to increase gradually the tax on beer made by small manufacturers (who do not

produce more than 31 million gallons a year), the alcoholic content of which is more than 1.5% by volume, from $2.15 per measured gallon (or a proportional amount per fraction) to $2.15 per half gallon for production up to nine million a year; $2.36 per measured gallon for production from 9 to 10 million gallons a year; $2.57 per measured gallon for production from 10 to 11 million gallons a year; $2.78 per measured gallon for production from 11 to 12 million gallons a year; and $2.99 per measured gallon per production from 12 to 31 million gallons a year.

It is necessary once again to emphasize the fact that the special exemption has existed without interruption since 1978. As we mentioned before, this special exemption was supported by the Supreme Court of Puerto Rico in the case *U.S. Brewers Assoc. v. Secretario de Hacienda, supra.*

Thus, having made the background of the special exemption clear, we shall now go on to discuss the error brought up by the appellants to the effect that the special exemption of Article 2 of Public Law 69 violates section 3 of the Federal Relations Act and the Commerce Clause.

First of all, the appellants state that the case of *U.S. Brewers Assoc., supra,* was not resolved under the legal and constitutional provisions invoked in the above-captioned case and, therefore, it cannot constitute a binding precedent for resolving the questions set forth.

As is well known, the Court of First Instance ruled that the decision of the Supreme Court in the case of *U.S. Brewers Assoc. v. Secretario de Hacienda, supra,* obligated it to dismiss all the claims in the lawsuit, that is, both the causes of action based on the Commerce Clause and the cause of action based on Article 3 of the Federal Relations Act. In this regard, the appellants state that "the case of *U.S. Brewers* did not resolve the validity of Public Law 37 under section 3 of the Federal Relations Act or under the Commerce Clause. The appellees point out that the Court of First Instance not only acted correctly in dismissing the Sworn Petition on the aforementioned grounds, but also by virtue of the doctrine of *stare decisis,* it was required that it dismiss the cause of action under Article 3 of the Federal Relations Act, pursuant to the decision in the case of *U.S. Brewers Assoc. v. Secretario de Hacienda, supra.* Let us see.

In the case of *U.S. Brewers,* the Supreme Court explained that the plaintiffs in that case had based their argument on the analysis of Article 3 of the Federal Relations Act, adopted in the case of *San Juan Trading v. Sancho,* 114 F.2d 969 (1st Cir, 1940). *U.S. Brewers Assoc. v. Secretario de Hacienda.* at pages 460-461. In the case of *San Juan Trading,* the validity of a provision of the Puerto Rico Internal Revenue Code that was in force at that time, was challenged; the provision levied a lower tax on round matches (manufactured only in Puerto Rico) than that levied on square matches (which were imported into Puerto Rico). According to the plaintiffs in that

case, this difference violated Section 3 of the Organic Charter of 1917, equivalent to Article 3 of the Federal Relations Act. The Court of Appeals for the First Circuit invalidated the provision challenged for violating Section 3 of the Organic Charter of 1917, the predecessor of and identical to Article 3 of the Federal Relations Act, by ruling that the intent expressed by the government to establish a distinction between round matches and square matches was to protect matches manufactured locally from the competition from matches that were only manufactured abroad and imported by United States companies. *Id.* at page 974. The analysis used was first to determine whether the distinction created by law between square and round matches was reasonable and, then, whether it discriminated against imported matches.

In *U.S. Brewers,* the Supreme Court of Puerto Rico conducted this analysis and determined that the special exemption was different from the schedule examined in *San Juan Trading* because the distinction based on the size of the business is reasonable and the fact that local breweries paid a lower tax is an incidental fact that does not justify voiding the special exemption, because there are American and foreign companies that benefit from the special exemption and others that could benefit from the exemption, if they were to decide to sell their beers in Puerto Rico. *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at pages 460-461. Thus, our highest court took the matter of Article 3 of the

Federal Relations Act into consideration before analyzing the arguments on the equal protection of the laws and due process of law.

Specifically, the Court ruled as follows:

> The text of Public Law No. 37 distinguishes between beers produced by companies whose total production exceeds 31,000,000 gallons a year and beers produced by companies whose annual production does not reach that amount. The appellants sustain that since there are no local companies whose production exceeds 31,000,000 gallons, the classification of the Law results in an undue distinction, based on the place where the beer is produced, in order to benefit local companies. In support of their position, the appellants mention *San Juan Trading Co. v. Sancho,* 114 F2nd 969 (1940). The facts in that case, although they are similar to those in the one before us, differ in at least one essential detail. In *San Juan Trading,* the classification was established in order to distinguish between square and round matches. The court ruled that this classification did not, in any way, justify the levying of a different tax on two such similar objects. In the case before us, the classification is based on the size of the company, which provides some economies in the production of the beer that makes it possible to generate more profit. Taking into account the economic situation of the beer industry, the legislators tried, as well as he/she could, to distribute the tax burden among breweries according to their

potential for generating profits. As stated in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509-510 (1937), "the Legislature, when levying a tax, is not bound to levy it on all the members of a class. It can make distinctions of degree that have a rational basis, and when these distinctions are submitted to legal scrutiny, it must be assumed that they have a rational basis and that it is conceivable that there is some situation of facts that justify the distinction." The challenged distinction is a reasonable one that can be used as the basis for levying different taxes. The same has been used by the United States Congress when it approved a tax with a similar effect on beer production. Public Law 94-529 (H.R. 3605); Oct. 17, 1976; U.S.C.A. § 5051. The legislative record of that law, 5 U.S. Code Cong. & Ad. News 5535-38, indicates that the purpose of that law was to help small breweries by reducing the tax on such companies so that they could compete more effectively with large breweries.

Since the Legislature acted based on a reasonable classification, it is not appropriate to rescind the law because of the sole incidental fact that local breweries pay a lower tax. There are American breweries (Champale) and foreign breweries (Hofbraw[sic]) that pay the lower tax, including the 34 members of the United States Brewers Association, 16 of which would qualify to pay the lower tax if they decided to sell their beers in Puerto Rico.

The above transcript shows that the Court dealt with the plaintiffs' argument regarding whether or not the exemption discriminated against foreign breweries and those from the United States or not (which is the plaintiffs' argument in the case under Art. 3 of the Federal Relations Act); and that, following the analysis made in *San Juan Trading,* distinguished it from the case before it, ruling that the clause challenged in *U.S. Brewers,* in addition to being reasonable, applies equally to local beers and beers from the United States and abroad, including the to 16 members of the *U.S. Brewers Association* if they were to decide to sell their products in Puerto Rico. Thus, the Court resolved the assertions made under Article 3 of the Federal Relations Act in relation to the special exemption, and that opinion is still in effect and it therefore constitutes *stare decisis* for this court.

In view of the above, we conclude that since the decision of the Supreme Court in the case of *U.S. Brewers Assoc.* is in effect, by virtue of the doctrine of *stare decisis,* the Court of First Instance was obligated to apply it and thus rule that the special exemption does not violate Article 3 of the Federal Relations Act.

IV

Now, the appellants also allege that the special exemption established in Public Law 69 violates the Commerce Clause. In that regard, the Court of First

Instance ruled that, in spite of the fact that the case of *U.S. Brewers* did not deal specifically with the Commerce Clause, its decision calls for the dismissal of the claims based on this Clause. See Judgment, at pages 10-12, Ap. At pages 735-737. This is the case because in *U.S. Brewers,* identical arguments been on the discriminatory intent and effects, which were rejected by the Supreme Court. *Id.* In this regard, the Court of First Instance concluded as follows:

> In conclusion, in view of arguments identical to those presented by the plaintiffs in the case before us, the Supreme Court of Puerto Rico ruled in *U.S. Brewers* that the special exemption does not discriminate against imported beers in intent or effect and that, to the contrary, it has the legitimate purpose of protecting beers of smaller size and production, without taking into consideration the place where the beer is produced. These rulings by the Supreme Court of Puerto Rico in *U.S. Brewers* are binding and also force the dismissal of the claims based on the interstate and international commerce clause, in spite of the fact that said case was resolved based on Article 3 of the Federal Relations Act and equal protection of the law, even if not under the interstate and international commerce clause. We reach this conclusion because the decisions as to whether the intention of the Legislature of Puerto Rico was to discriminate against imported beer and whether the law applies solely to local companies and, therefore, has discriminatory effects, is the same regardless

> of whether the claim was for violation of Article 3 of the Federal Relations Act and equal protection of laws, or for an alleged violation of the interstate and international commerce clause.
>
> The claim of the plaintiffs based on the interstate and international commerce clause is founded exclusively on the alleged discriminatory intent and effects against imported beer. We are bound by the doctrine of *stare decisis* to rule that that is not the case and, therefore, it is appropriate to dismiss the claims contained in the First and Second Causes of Action in the Sworn Petition, which are based on this constitutional provision. See Judgment of the Court of First Instance, at page 737.

However, in addition to all of the above as to the special exemption not violating the commerce clause, we shall make an in-depth analysis of this point. Let us see.

The Interstate and International Commerce Clause of the United States Constitution, Article 1, Section 8, Third Clause of the Constitution, is one of the principal sources of Congressional powers. *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330 (1996); *Barclays Bank v. Franchaise Tax Board,* 512, U.S. 298, 310 (1994). At the same time, several decades ago, the United States Supreme Court established that this clause also has a negative aspect that limits certain actions of local governments that may have an impact on interstate and international commerce. *Fulton*

Corp. v. Faulkner, 516 U.S. at page 330; *Barclays Bank v. Franchaise Tax Board,* 512, U.S. at page 310. Specifically, the dormant aspect of the Commerce Clause prohibits economic protectionism; that is, that local governments establish standards aimed primarily at protecting or favoring their economies, setting up obstacles to imported products. *General Motors Corp. v. Tracy,* 519 U.S. 278, 287 (1997); *Fulton Corp. v. Faulkner,* 516 U.S., at page 330; *West Lynn Creamery v. Healy,* 512 U.S. 186, 192 (1994). If the claimant is able to demonstrate that the state standard is in effect a protectionist standard, since it discriminates against interstate or international commerce, it shall be invalidated unless the state can demonstrate that "the discrimination is demonstrally [sic] justified by a valid factor unrelated to economic protectionism." *West Lynn Creamery v. Healy,* 512 U.S. 186, 192-193, citing *New Energy Co. v. Limbach,* 486 U.S. 269, 273-274 (1988).

On the other hand, the appellants allege that the special exemption for breweries whose annual production does not exceed 31 million gallons discriminates against interstate or international commerce. See Lawsuit, First and Second Causes of Action, Ap. At pages 12-15. They are mistaken.

A tax discriminates against interstate commerce if "it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a State." *Fulton Corp. v. Faulkner,* 516 U.S., at page 331, citing *Chemical Waste Management, Inc., v. Hunt,* 504 U.S. 334, 342 (1992). See

also, *Camps Newfound/Owatonna v. Harison,* 520 U.S. 564, 580-581 (1997). Based on this criterion, Public Law 69, and in particular the special exemption provided for in Article 2, does not discriminate against interstate or international commerce. Thus, the special exemption applies in an identical and neutral manner since it benefits any brewery whose annual production does not exceed 31,000,000 gallons, regardless of whether or not the beer is imported from the United States or from a foreign country, or whether it is produced or sold in Puerto Rico. Now, as argued by the appellants, and as recognized by the Court of First Instance, the fact that the law is not discriminatory *prima facie,* does not resolve the controversy fully. Thus, a neutral law, *prima facie,* can violate the dormant aspect of the Commerce Clause if its intent or effect is protectionist. *West Lynn Creamery v. Healy,* 512 U.S. 186, 194 (1994); *Bacchus Imports, Ltd., V. Dias.* 468 U.S. 263, 270 (1984).

The appellants argued before the Court of First Instance that although Public Law 69 is neutral and non-discriminatory, *prima facie,* it has the intent and effect of discriminating against interstate and international commerce. See Lawsuit, paragraphs 43, 44, 47, 51, Ap. at pages 12-14. The appellants base this argument exclusively on the ruling in the case *Bacchus Imports, Ltd. V. Días,* 468 U.S. 263 (1984). See Request for Preliminary Injunction, at pages 8-10, Ap. at pages 38-40.

It is necessary to distinguish between the facts in the case of *Bacchus* and the facts in the case before us. Said case questioned a law of the State of Hawaii that levied a tax on alcoholic beverages but exempted two types of beverages that were produced only in Hawaii. *Bacchus Imports, Ltd. V. Días,* 468 U.S. at page 225. By establishing this exception, the legislature of Hawaii clearly indicated that its intent was to promote the development of Hawaii's liquor industry. *Id.* In view of this express intent, the Supreme Court of the United States had no difficulty in ruling that this was a protectionist measure in its intent. The express intent of the special exemption in that case was to promote the local beverage industry. *Id.* Pages 270-271. The Supreme Court ruled that "[t]hus we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exception was to aid Hawaiian industry." *Id.* at page 271.

The case before us is diametrically different from that in *Bacchus,* since there is nothing in either Public Law 69 or in its legislative record that reasonably leads us to conclude that the special exemption is intended to promote or protect local industries.

On the other hand, the letter of Public Law 96, and specifically Article 2, which is challenged, is very clear. This law stipulates that [the special exemption] applies to all beers produced or manufactured "by persons whose total production, if any, of said products during their most recent tax year has not exceeded thirty-one million (31,000,000) measured gallons." See Article 2 of Public Law 69.

There is nothing in this text that makes it possible to conclude that the intention of the legislators was to favor or promote local breweries. The exemption applies to all breweries whose annual production is less than 31,000,000 gallons, regardless of where the product is manufactured or sold.

It has also established that if it is necessary to go beyond the clear text of the Law in order to determine its intent, the courts can examine its legislative record. To that end, the Supreme Court of Puerto Rico has established that the most important piece of that legislative record is the statement of motives of the law since "this generally reflects the intent that inspired its creation."

Public Law 69 contains a statement of motives and, more importantly, it contains the intent that inspired the special exemption. The statement of motives of this law states:

> The tax measures that are established through this measure shall not affect other areas of the country's economic base. Therefore, in the case of beer, the mechanism used is the one supported by the Supreme Court of Puerto Rico in *U.S. Brewers Assoc. v. Secretario de Hacienda* 109 D.P.R. 456 (1980) to guarantee that industries with smaller productions can continue to operate without change. In those cases, as their production capacity increases, and as a result, their economic stability, their fiscal responsibility shall gradually increase. Thus, it is the public policy

> of the Commonwealth of Puerto Rico to take steps to ensure that small beer-producing industries do not bear the brunt of a new increase in taxes until their annual production and economic capacity so justify. In particular, it is stipulated that beers whose production is less than thirty-one million (31,000,000) measured gallons a year shall be exempt from the increased tax until they achieve a specific annual production; and the tax shall increase progressively until it equals the percentage of increase in the tax levied on breweries with greater production. See Statement of Motives of Public Law 69, Ap., at Page 47.

The above-transcribed statement of motives clearly indicates that the intent of the special exemption is that which is also reflected in the clear text of the statute: that small beer-producing industries not carry the brunt of the new tax until their annual production and economic capacity so justify.

Therefore, from the text of Public Law 69, as well as from its statement of motives, it is clear that the special exemption is not protectionist in its intent, but rather is intended to treat small businesses more favorably, regardless of their origin or where the beer is produced or sold.

A neutral law, *prima facie,* can also violate the Commerce Clause if it has protectionist effects. *West Lynn Creamery v. Healy,* 512 U.S. 186, 194 (1994); *Bacchus Imports, Ltd. V. Dias.* 468 U.S. 263, 270 (1984). The appellants, basing their arguments on

what was allegedly resolved in the case of *Bacchus,* argued before the Court of First Instance that the special exemption has protectionist effects and therefore violates the Commerce Clause because it benefits only one local company, Cevecería India, placing a higher tax on breweries manufactured [sic] in the United States and foreign countries. See Lawsuit, paragraphs 39, 42, 44, 47, Ap. at pages 11-13. Nevertheless, in view of the above, it can be concluded that the special exemption does not have a protectionist effect.

In the case of *Bacchus,* the questioned law exempted two types of beverages produced solely in Hawaii, called "Okolehao," from the tax. *Bacchus Imports, Ltd., v. Dias* 468 U.S. at pages 265, 269, 271. Thus, the Supreme Court of the United States concluded that "the effect of the exception is clearly discriminatory, in that it applies only to local produce [sic] beverages, even though it does not apply to such products." *Id.* at page 271.

In the case before us, beer is produced in all parts of the world, since throughout the world there are beer-producing companies whose annual production does not exceed 31,000,000 gallons. All of them can benefit from the special exemption "should they decide to sell their beers in Puerto Rico." *U.S. Brewers v. Secretario de Hacienda,* 109 D.P.R. at page 461. This is how appellants in this case saw it in their Opposition to the Motion for Dismissal, submitted by the appellants on July 8, 2002, when they stated:

> "We have been able to corroborate that there are only 2 manufacturers of beers produced outside Puerto Rico that, at this time, benefit from the special exemption – Mike's Hard Lemonade and Cruzan Island Cocktails. Although Samuel Adams was eligible for the special exemption in the past, it no longer is. And as to Bacardi Breezers, Bacardi has discontinued their production."[4]

The Court of First Instance stated the following in response to this admission by the appellants:

> Although the plaintiffs suggest, in paragraph [39] of their Sworn Petition, that the special exemption favors "just one producer and its exclusive distributor," they were presumably referring to co-defendants India and CC1 Beer Distributors, in their oral arguments and their briefs, they admit there are other beers or beverages that benefit from the special exemption, including some produced outside Puerto Rico. See also, page 10 (footnote 11) and at page 16 (footnote 15) of a "Response" submitted by the Plaintiffs on July 8, 2002.

To this end, it should be noted that the Court of First Instance had only to assume the truth of what the appellants admitted.

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[4] APIC Joint Response . . . ," at page 10, footnote 11, Ap. at page 1685.

In view of all the above, it is own understanding that the Court of First Instance did not deal with the points of error raised by the appellants and that the court acted correctly in dismissing the Sworn Petition, concluding that the special exemption established in Public Law Number 69 does not have discriminatory effects, since it benefits beer producers on the basis of their volume of production, regardless of where the beer is produced.

V

In view of the above-stated grounds, we confirm the appealed judgment.

Notify.

The court and so agreed and issues and the general clerk so certifies.

[illegible signature]

Aida Ileana Oquendo Graulau
General Clerk

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Barbara M. Cohen, of legal age, single, resident of Miami Lakes, FL., professional interpreter/ translator, certified by the Administrative Office of the United States Courts and an accredited member in good standing of the American Translators Association, do HEREBY CERTIFY that I have personally translated the foregoing document and

that it is a true and accurate translation to the best of my knowledge and abilities

In San Juan, Puerto Rico, today, February 20, 2007.

/s/ Barbara M. Cohen
Barbara M. Cohen
ATABEX TRANSLATION SPECIALISTS, Inc
P.O. Box 195044, San Juan, PR 00919-5044

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF SAN JUAN

ASOCIACIÓN PUERTORRIQUEÑA DE IMPORTADORES DE CERVEZA, INC. et al Plaintiffs v. COMMONWEALTH OF PUERTO RICO et.al. Defendants	CIVIL NO. KPE2002-1282 (907) SUBJECT: EXTRAORDINARY REMEDIES: DECLARATORY JUDGMENT AND REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

JUDGMENT

We are to decide whether the schedule of taxes applicable to beer, by which brewing companies that produce more than thirty-one million (31,000,000) gallons of beer per year pay a higher rate than those that produce a lesser amount, violates Article 3 of the Federal Relations Act, as well as the interstate and international Commerce Clause of the United States Constitution.

I.

The plaintiffs in the case are the Asociación Puertorriqueña de Importadores de Cervezas (a Puerto Rican not-for-profit corporation whose members include several distributors of imported beer), Heineken Brouwerijen, N.V. (a Dutch company that produces

the imported beer Heinéken), and the Puerto Rican companies that distribute imported beer, V. Suárez & Company, Inc., B. Fernández Hermanos, Inc., and Ballester Hermanos, Inc. (hereinafter, "the plaintiffs").[1]

On June 13, 2002, the plaintiffs submitted a Sworn Petition, challenging the validity of Article 2 of Public Law No. 69 of May 30, 2002 (hereinafter, "Public Law 69"), that amended sections 4002 and 4023 of the Puerto Rico Internal Revenue Code, 13 L.P.R.A. §§ 9521 and 9574, to increase taxes applicable to distilled spirits, wines and beers. Article 2 of this law, which is the one questioned in this lawsuit, amended section 4023 of the Puerto Rico Internal Revenue Code, 13 L.P.R.A, § 9574, which imposes a lower tax on beers produced or manufactured "by persons whose total production, if any, of said products during their most recent tax year has not exceeded thirty-one million (31,000,000) gallons measured."[2] In their Sworn Petition, the plaintiffs allege that the special exemption provided by Article 2 of Public Law 69 has the purpose and effect of

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[1] Coors Brewing Company, a brewing company that was one of the original plaintiffs in the case, desisted without prejudice to its claims on July 23, 2002.

[2] The exemption contained in Article 2 of Public Law 69, entitled "special exemption," applies to all "malt extract and other similar fermented and non-fermented products whose alcoholic content exceeds one and a half percent (1.5%) by volume." See Article 2 of Public Law 69. Just as the parties in this lawsuit have done, we call the whole of such drinks "beer."

favoring beer produced in Puerto Rico, particularly Cerveceria India, and works against imported beers. They allege that this constitutes a protectionist act that violates the interstate and international commerce clause of the United States Constitution (First and Second Causes of Action), as well as Article 3 of the Federal Relations Act (Third Cause of Action). As a remedy to these alleged constitutional and legal problems, the plaintiffs ask that a declaratory judgment be issued ruling that Article 2 of Public Law 69 violates the above-mentioned legal provisions, and they ask that an injunction be issued ordering the Secretary of the Treasury to collect taxes equally from all taxpayers, without applying the special exemption provided by Article 2 of Public Law 69. Lastly, and in a separate petition, the plaintiffs request that a preliminary injunction be issued "that prohibits the Commonwealth of Puerto Rico, through the Secretary of the Treasury, from implementing Article 2 of Public Law 69" until the lawsuit has been decided on its merits.

On June 25, 2002, co-defendants Cerveceria India, Inc, and the distributor of its beers, CC1 Beer Distributors, Inc. submitted a "Motion for Dismissal and Opposition to the Request for Preliminary Injunction" (hereinafter, "Motion for Dismissal of India and CC1"). Subsequently, on July 3, 2002, these co-defendants supplemented their Motion for Dismissal, adding two additional grounds. On July 10, 2002, the remaining co-defendants, the Commonwealth of Puerto Rico and the Secretary of the Treasury of

Puerto Rico, Hon. José A. Flores Galarza, also submitted a Motion for Dismissal and Opposition to the Request for Injunctive Relief (hereinafter, "Commonwealth of Puerto Rico Motion for Dismissal"). The plaintiffs opposed the Motion for Dismissal submitted by India and CC1 on July 8, 2002, and the one submitted by the Commonwealth of Puerto Rico and the Secretary of the Treasury on July 12, 2002.

After studying these briefs and others submitted by the parties, and after evaluating the arguments set forth in a hearing to present arguments held on July 23, 2002, we are in a position to decide the issues presented in the motions for dismissal submitted by the defendants. Nevertheless, before addressing these issues in detail, we shall briefly discuss the background of the special exemption and the ruling of the Supreme Court of Puerto Rico in the case *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. 456 (1980), which have a bearing on a large part of the issues presented in the motions for dismissal now before us for our consideration.

II.

Article 2 of Public Law 69, challenged in this lawsuit, originated in Public Law No. 37 of July 13, 1978 (hereinafter, "Public Law 37"). This law increased the tax on beer to $1.60 a gallon and established, for the first time, the special exemption for beers the production of which during the previous tax year had not exceeded thirty-one million (31,000,000)

gallons. See Public Law No. 37; see also *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R., at page 458. The latter were to pay $1.05 per gallon. Id.

Soon after its approval, the special exemption was challenged by the U.S. Brewers Association, made up of the producers of 95% of the beer sold in the United States and several beer manufacturing or distributing companies of the United States and foreign countries, alleging that the intent and effect of the exemption discriminated against foreign beers to the benefit of local beers. *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at page 460. The plaintiffs claimed that this discrimination violated the equal protection of the laws and Article 3 of the Federal Relations Act. Id. to page 459.

The Supreme Court confirmed the judgment issued by the Court of First Instance dismissing the lawsuit and ruled that the special exemption does not violate Article 3 of the Federal Relations Act or the equal protection of the law. In doing so, the Supreme Court ruled that the special exemption did not have any discriminatory intent, but rather the legitimate purpose of "distributing the tax burden among the brewing companies according to their potential for generating profits." Id., at page 461. Likewise, it ruled that the effect of the law was not discriminatory, but contrary to what the plaintiffs argued in that case, the special exemption equally favored small foreign breweries and American breweries that sold or could sell their products in Puerto Rico, Id., at page 461.

After 1978, and before Public Law 69, the provisions on taxes on beers were amended two times for the sole purpose of increasing the amount of the tax, but always maintaining the special exemption applicable to small breweries, whose annual production did not surpass thirty-one million (31,000,000) gallons. See Public Law No. 12 of June 10, 1981; Public Law 22 of July 14, 1989.[3]

The only other amendment to the provision on taxes on beers since the approval of Public Law 37 in 1978 was the one made this year with Public Law 69. The statement of motives of said law stipulates that its purpose is to increase taxes on distilled spirits; wines and beers to provide additional revenue for the General Fund of the Commonwealth of Puerto Rico. As to beer, Public Law 69 increased the tax to $4.05 for each measured gallon, while Article 2 maintained the special exemption for beer produced by persons whose total production during their most recent tax year did not exceed thirty-one million gallons (31,000,000). See Article 2 of Public Law 69. However, instead of a uniform excise tax for the beers to which the special exemption applies, Public Law 69 provided different rates, depending on the level of production of

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[3] Public Law 12 of June 10, 1981, increased the tax on beer to $1.85 and the one applicable to beers that benefit from the special exemption to $1.25. Public Law No. 22 of July 14, 1989, increased the tax on all beers an additional $0.90; to $2.75 for beers with greater production and $2.15 for beers that benefit from the special exemption.

the company that produced the beer. To this end, Article 2 of Public Law 60 establishes the following tax for beers whose annual production is less than thirty-one million (31,000,000) gallons:

> Two dollars and fifteen cents ($2.15) for each measured gallon produced up to nine million (9,000,000) measured gallons;
>
> Two dollars and thirty-six cents ($2.36) for each measured gallon produced in excess of nine million (9,000,000) but less than ten million (10,000,000) gallons;
>
> Two dollars and fifty-seven cents ($2.57) for each measured gallon produced in excess of ten million (10,000,000) but less than 11 million (11,000,000) gallons;
>
> Two dollars and seventy-eight cents ($2.78) for each measured gallon produced in excess of eleven million (11,000,000) but less than twelve million (12,000,000) gallons,
>
> Two dollars and ninety-nine cents ($2.99) for each measured gallon produced in excess of twelve million (12,000,000) but less than thirty-one million (31,000,000) gallons.

13 L.P.R. § 9574.

After this brief, but necessary, discussion we shall now address the issues presented by the defendants in their respective motions for dismissal.

III.

A. Article 3 of the Federal Relations Act

Both the Commonwealth of Puerto Rico and co-defendants India and CC1 Beer Distributors request that the court dismiss the Third Cause of Action of the Sworn Petition, which is the plaintiffs' claim, based on Article 3 of the Federal Relations Act, as they understand that in the case of *U.S. Brewers Assoc. v. Secretario de Hacienda.* 109 D.P.R. at page 456 (1980), our Supreme Court ruled that the special exemption does not violate said article. They add that this ruling of the Supreme Court of Puerto Rico is a binding precedent that requires that we rule in the same manner.

In opposition to this, the plaintiffs argue that the opinion in the case of *U.S. Brewers* is not binding in this case because (1) it is not based on Article 3 of the Federal Relations Act, but rather on the clauses regarding equal protection of the law and due process of law of our Constitution; (2) even though said decision concluded that the special exemption does not violate Article 3 of the Federal Relations Act, it does not obligate us, since the doctrine of *stare decisis* does not operate in Puerto Rico in the same way as it does in the United States; and (3) *U.S. Brewers* evaluated the validity of Public Law 37, and not

Public Law 69, which is the one challenged in this case.[4]

We agree with the defendants in that the ruling in the *U.S. Brewers* case obligates us to dismiss the claim of the plaintiffs based on Article 3 of the Federal Relations Act. As we saw, the plaintiffs alleged in the case in question that the special exemption violates Article 3 of the Federal Relations Act. Thus, when explaining the issues presented in the case, the Supreme Court stated that "the defendants allege that Public Law 37 . . . is null and void since it violates Section 3 of the Federal Relations Act." *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at page 459. Immediately afterwards, the Supreme

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[4] The defendants also allege that the *U.S. Brewers* case is not binding because a reservation of law had been made under the doctrine set forth in the case *England v. Medical Examiners* 375 U.S. 411 (1964). It is our understanding that they are mistaken since an England reservation requires that the federal court have made a Pullman abstention, which did not occur in this case. See *Duty Free Shop v. Adm. de Terrenos* 889 F. 2d 1181, 1182-83 (1st Cir. 1989); see also Wright, Miller & Cooper, *Federal Practices & Procedures,* Sec. 4243, p. 7 (2002 Supplement). Although *U.S. Brewers* started in the Federal District Court, there was no abstention but rather a dismissal, and it was not based on the Pullman Doctrine but on the Butler Act. See *U.S. Brewers Assoc. v. Pérez,* 455 F. Supp. 1159 (D. Puerto Rico 1978); *U.S. Brewer Assoc. v. Pérez,* 592 F. 2nd 1212 (1st Cir. 1979). In any case, even if this argument were appropriate, it is not an element of this controversy since the Supreme Court addressed and ruled on the arguments based on Article 3 of the Federal Relations Act and, in view of the fact that this ruling is still in effect, it constitutes the doctrine of *stare decisis* for this court.

Court discussed this controversy in detail and ruled that the special exemption does not violate Article 3 of the Federal Relations Act. Id. at pages 450, 461.

The plaintiffs argue that this ruling does not obligate us because in *U.S. Brewers,* the Supreme Court did not rely on Section 3 of the Federal Relations Act but on the clauses regarding equal protection of the law and due process of law of our Constitution. They are mistaken.

The opinion of the Supreme Court in *U.S. Brewers* explains that the plaintiffs in that case had based their argument on the analysis of Article 3 of the Federal Relations Act, adopted in the case of *San Juan Trading Co. v. Sancho,* 114 F. 2d 969 (1st Cir. 1940). *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at pages 450-461. In the case of *San Juan Trading,* the validity of a provision of the Puerto Rico Internal Revenue Code in force at that time was challenged. This provision levied a lower tax on round matches (produced *solely* in Puerto Rico) than that on square matches (imported into Puerto Rico). According to the plaintiffs in that case, this difference violated Section 3 of the Organic Charter of 1917, equivalent to Article 3 of the Federal Relations Act. The Federal Court of Appeals for the First Circuit invalidated the challenged provision for violating Section 3 of the Organic Charter of 1917, the predecessor of and identical to Article 3 of the Federal Relations Act, by ruling that the intention expressed by the government to establish a difference between round matches and square matches was to protect

matches produced locally from the competition of matches that were produced solely abroad and imported by United States companies. Id. at page 974. The analysis used was first to determine if the difference created by law between square and round matches was reasonable and, then whether it discriminated against imported matches.

In *U.S. Brewers,* our Supreme Court made this analysis and ruled that the special exemption was different from the schedule examined in *San Juan Trading* because the difference based on the size of the company is reasonable, and the fact that local breweries pay less is an incidental fact that does not justify voiding the special exemption, since there are American and foreign companies that benefit from the special exemption and others that could benefit from this exemption if they decided to sell their beers in Puerto Rico. *U.S. Brewers Assoc. v. Secretario de Hacienda,* 109 D.P.R. at pages 460-461. Thus, the Supreme Court addressed the issue of Article 3 of the Federal Relations Act before analyzing the arguments on equal protection of the law and due process of law. Upon looking at the text of *San Juan Trading,* it is easy to grasp that the discussion at pages 460 and 461 of the *U.S. Brewers Assoc. v. Secretario de Hacienda* case deals with Article 3 of the Federal Relations Act.

Nor are the plaintiffs right in arguing that the ruling in *U.S. Brewers* does not obligate us since the doctrine of *stare decisis* does not strictly apply, "in the Anglo-Saxon manner." Regardless of the origin of the

standard in Puerto Rico, it is an indisputable principle that the decisions of the Supreme Court of Puerto Rico are binding precedents for all courts in Puerto Rico, including, of course, this court. *In re Designación Comité Especial Secretariado de la Conferencia Judicial,* 131 D.P.R. 526, 526-527 (1992)[5]. In view of this, this court cannot, as suggested by the plaintiffs, ignore the ruling of the Supreme Court of Puerto Rico in the case of *U.S. Brewers,* even if it were to understand that said case was ruled on unsatisfactorily. The case has not been revoked and, therefore, this court does not have any discretion whatsoever, other than to rule, as the Supreme Court did in that case, that the special exemption does not violate Article 3 of the Federal Relations Act.

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[5] The cases cited by the plaintiffs in support of the argument that the ruling of the Supreme court of Puerto Rico does not necessarily obligate us are not applicable. The quotes submitted by the plaintiffs in the cases *Irizarri v. Pueblo,* 75 D.P.R. 786 (1954), and *Agostini v. Feldman,* 521 U.S. 203 (1997), refer solely to the well-known standard that the doctrine of *stare decisis* does not prohibit the Supreme Court of Puerto Rico or the United States Supreme Court from reconsidering a standard that has been previously established if it is understood that it is erroneous. The lower court does not have the discretion of the Supreme Court to establish the precedent and is obligated by said precedent. On the other hand, the case of *Torres Cruz v. Municipio de San Juan,* 103 D.P.R. 217, 222 (1975), also cited by the plaintiffs, reiterates the standard that does not apply to the issue of the case on record, since the doctrine of the case law does not prohibit a judge from reconsidering his/her own ruling in a particular case, or the decision of another judge at the same level, if he/she understands that it is erroneous in law.

Lastly, contrary to what the plaintiffs argue, the case of *U.S. Brewers* dealt with the same special exemption that is questioned in this case. As we stated previously, Article 2 of Public Law 69 is an amendment to the special exemption, created in 1978 by Public Law 37. The changes made to the special exemption since 1978, previously discussed, are limited to increases in the amounts of the taxes for both large companies and those that benefit from the special exemption, and the mechanism of the incremental increase in the tax established in Public Law 69. These changes do not in any way affect the term of the ruling of the Supreme Court in the case of *U.S. Brewers,* since the plaintiffs argue that it is the preferential treatment provided by the special exemption that violates Article 3, and not the different increases in the tax rates adopted over the years and, most recently, in Public Law 69.[6]

In our view, the opinion of our Supreme Court in the above-mentioned case refers to the attack on Public Law 69 under Article 3 of the Federal Relations Act. In this case, our highest court has already had the opportunity to examine the tax schedule that exists in Puerto Rico for brewing companies and the difference established so that beer produced by smaller brewing companies can be subject to a lower

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[6] In fact, in the oral arguments and in several of their briefs, the plaintiffs admit that their statements are based on unequal treatment *per se* and not on the amounts for the different levels of the taxes established.

tax. Public Law 69 incorporated certain increases into the tax schedule and staggered the taxes on beers with a production of less than 31,000,000 gallons, but it did not alter the tax schedule supported by the Supreme Court in the case of *U.S. Brewers Assoc. v. Secretario de Hacienda.* Thus, this ruling constitutes the doctrine of *stare decisis* that this court is bound to apply in this case. In view of this, we hereby FIND FOR the defendants' request for dismissal with regard to the Third Cause of Action of the Sworn Petition.

B. The Interstate and International Commerce Clause

The doctrine of *stare decisis* discussed previously would also seem to resolve the claims of the plaintiffs according to the Commerce Clause of the United States Constitution, since, in the case of *RCA v. Gobierno de la Capital,* 91 D.P.R. 416 (1964), our Supreme Court ruled that the federal Commerce Clause does not apply in Puerto Rico, and said opinion has never been expressly revoked. Nonetheless, in view of the fact that after that ruling, our highest court has addressed the statements under the protection of the interstate Commerce Clause, on its merits, we understand that the rulings of the Supreme Court offer sufficient precedents for this court to address the statements of the plaintiffs in this case. *See. Banco Popular de Puerto Rico v. Municipio*

de Mayagüez, 126 D.P.R. 653, 658 (1998).[7] Thus, following the example of our Supreme Court, we shall examine the First and Second Causes of Action of the Sworn Petition in which the plaintiffs allege that the special exemption violates the interstate and international Commerce Clause of the United States Constitution, since it is a protectionist and discriminatory measure against interstate and international commerce. Since Article 2 of Public Law 69 distinguishes between breweries based solely on the number of gallons of beer they produce, the plaintiffs recognize that the alleged constitutional defects are not evident *prima facie,* but from their alleged protectionist intent and their discriminatory effect on imported beers in favor of a local beer.

The defendants request that these causes of action be dismissed, arguing that the special exemption is neutral since it applies uniformly to all small breweries without taking into consideration where the beer is produced. They add that in the Sworn Petition there is no fact that must be presumed to be true, that allows us to conclude that the intent of the special exemption is protectionist or that it has discriminatory effects on interstate commerce. Lastly, they argue that the case of *U.S. Brewers,* also

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[7] The United States Court of Appeals for the First Circuit, in turn, has ruled that the interstate Commerce Clause applies to Puerto Rico in the same way as it applies to the States. *Starlight Sugar, Inc. v. Soto,* 253 F. 3rd 137, 145-146 (1st cir. 2001).

requires that the lawsuit be dismissed since, in view of arguments on discriminatory intent and effects identical to those presented in the case on record, the Supreme Court of Puerto Rico ruled in that case that the special exemption has no discriminatory intent or effects.

We have studied very carefully and thoroughly each and every one of the allegations of the Sworn Petition, as well as the in-sighted arguments that have been presented by the parties in their briefs and in the hearing for presentation of arguments that was held in this case. After this exercise, and presuming the truth of all the properly alleged facts in the Sworn Petition,[8] we find that it is appropriate to dismiss the First and Second Causes of Action of the Sworn Petition for the following reasons:

First, we agree with the defendants that the case of *U.S. Brewers,* also controls the resolution of claims based on the interstate and international Commerce Clause. We are aware of the fact that said case did not rule that the special exemption violates the interstate and international Commerce Clause since this issue is not presented in the case. Nonetheless, the allegations and arguments in that case and this

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[8] It is well known that in order to address a motion for dismissal, this court must assume that the properly alleged facts in the complaint are true and interpret the allegations in the most favorable way for the plaintiff. *Unisys v. Ramalo Brothers,* 128 D.P.R. 842, 858 (1991).

case are practically identical: in spite of the fact that the special exemption is, *prima facie,* neutral, it has a discriminatory intent and effects on beer imported from the United States and from other countries. It is our understanding that the ruling of the Supreme Court of Puerto Rico, that the intent and effect of the special exemption is not discriminatory, is binding and also calls for the dismissal of the First and Second Causes of Action of the Sworn Petition.

With regard to the alleged discriminatory intent against imported beer, the plaintiffs in *U.S. Brewers,* like those in the case on record, are based exclusively on statements by persons in the industry and legislators.[9] In spite of these statements, the Supreme Court of Puerto Rico refused to ignore the letter of the law, as well as the intent of same as demonstrated in the statement of motives, and found that the special exemption has the legitimate purpose of distributing

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[9] The plaintiffs in this case included a copy of the Lawsuit and the Opinion and Judgment of the Court of First Instance in the case of *U.S. Brewers* as appendices to their Opposition-to the Motion for Dismissal of India and CC1 Beer Distributors, submitted on July 8, 2002, and they requested that we take legal cognizance of these documents. We do so and note that both documents clearly reflect that the plaintiffs based their argument, that the intent of the special exemption is to discriminate against imported beer, on statements by certain legislators and members of the industry with a content that is similar to the statements submitted by the plaintiffs in this lawsuit. See Sworn Petition in the case *U.S. Brewers* paragraph 11; Opinion and Judgment of the Court of First Instance in the case of *U.S. Brewers,* pages 7-8.

the tax burden among breweries according to their potential for generating profits. *U.S. Brewers Association et al v. Secretario de Hacienda,* 109 D.P.R. at pages 460-461.

Likewise, the Supreme Court of Puerto Rico rejected the argument which is identical to the one in this lawsuit, in the sense that the special exemption has discriminatory effects since all local breweries pay the lower tax, because "there are American breweries (Champale) and foreign breweries (Hofbrau) that pay the lower tax and of the 34 members of the United States Brewers Association, 16 would qualify to pay the lower tax, if they were to decide to sell their beer in Puerto Rico." Id. at page 461. The plaintiffs in this case recognize that at this time, several imported beers qualify and benefit from the special exemption.[10] There is no doubt that there are other small breweries in the United States and other countries that can also benefit from the special exemption "if they decide to sell their beer in Puerto Rico."

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[10] Although in paragraph 19 of their Sworn Petition, the plaintiffs suggest that the special exemption favors "a single producer and its exclusive distributor," presumably referring to the co-defendants India and CC1 Beer Distributors, in the oral arguments and their briefs they admit that there are some beers or beverages that benefit from the special exemption, including some produced outside Puerto Rico. See also page 10 (footnote 11) and page 16 (footnote 15) of a "Response" submitted by the plaintiffs, on July 8, 2002.

In conclusion, in view of arguments that are identical to those presented by the plaintiffs in the case on record, the Supreme Court of Puerto Rico ruled in *U.S. Brewers* that neither the intent nor effects of the special exemption discriminate against imported beer and that, to the contrary, it has the legitimate purpose of protecting breweries of smaller size and smaller productions without taking into consideration where the beer is produced. These rulings of the Supreme Court of Puerto Rico in the case of *U.S. Brewers* are binding and obligate the court also to dismiss the claims based on the interstate and international Commerce Clause, in spite of the fact that that case was decided on the basis of Article 3 of the Federal Relations Act and equal protection of the law, but not under the interstate and international Commerce Clause. We reach this conclusion because the rulings of whether the Puerto Rican Legislature discriminated against imported beer and whether the law applies only to local companies and therefore has a discriminatory effect, is the same regardless of whether the claim is for violation of Article 3 of the Federal Relations Act and equal protection of the law, or because of alleged violation of the interstate and international Commerce Clause.

The claim of the plaintiffs, founded on the interstate and international Commerce Clause, is based exclusively on the alleged discriminatory intent and effects against imported beer. We are bound by the doctrine of *stare decisis* to rule that this is not so, and

therefore it is appropriate to dismiss the claims contained in the First and Second Causes of Action of the Sworn Petition, which are based on this constitutional provision. This by itself resolves the plaintiffs' claim based on the interstate and international Commerce Clause. Nonetheless, having evaluated the statements of the plaintiffs, we also note that the analysis required by the cited federal constitutional doctrine that the special exemption does not have discriminatory effects or purposes.

The interstate and international Commerce Clause of the United States Constitution gives the U.S. Congress the power to regulate interstate and international commerce. *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330 (1996). Inherent in this power, the courts have recognized that this clause also has a "dormant" aspect that prohibits local governments from establishing protectionist standards that favor their economies, thus establishing obstacles to the importation and sale of imported products. *Fulton Corp. v. Faulkner,* 516 U.S. at page 330; *West Lynn Creamery v. Healy,* 512 U.S. 186, 192 (1994). Tax measures, such as the ones questioned in the case on record, are invalid if they violate the Commerce Clause, if they are more onerous in regard to transactions or incidents that occur in or come from other countries or states than for those that occur locally. *Fulton Corp. v. Faulkner,* 516 U.S. at page 331; *Campos Newfound/Owatona v. Harrison,* 520 U.S. 564, 580-581 (1997).

Prima facie, the special exemption does not violate this standard, since, by its own terms, it applies to any brewery whose annual production does not exceed thirty-one million (31,000,000) gallons, regardless of where the beer is produced or sold. The plaintiffs admit this fact by recognizing in their Sworn Petition that neither Public Law 69 or its statement of motives "express, *prima facie,* a discriminatory or protectionist intent." See Sworn Petition, ¶¶ 43, 47, 51.

Notwithstanding the above, and based on the case of *Bacchus Imports, Ltd., v. Dias,* 468 U.S. 263 (1984), the plaintiffs allege that the special exemption violates the state [sic] and international Commerce Clause since the intent is to favor the Puerto Rican brewery, India, and discriminates against imported beers. We do not agree with the plaintiffs. The facts in the case of *Bacchus* are totally different from the case on record with respect to core aspects of the controversy. In *Bacchus,* a law of the state of Hawaii that establishes a tax exemption for some beverages produced only in Hawaii was challenged. *Bacchus Imports, Ltd., v. Dias,* 468 U.S. at pages 265, 269, 271. In addition, by establishing the exception, the Legislature of Hawaii clearly stated that its purpose was to promote the development of the liquor industry of Hawaii. Id.

Given the express intent of protecting local products, the Supreme Court of the United States ruled that the intent of the exception in *Bacchus* was protectionist. Id. at page 270-271. This is not the case

of Public Law 69, since there is nothing in the letter of the law or its legislative record that would reasonably lead to the conclusion that the intent of the special exemption was to promote or protect local industry.

As is well known, "the clear text of a law is the expression *par excellence* of legislative intent." *Irizarry v. Johnson & Johnson,* 2000 J.T.S. 27. The letter of Article 2 of Public Law 69 unequivocally establishes that it applies to all beer produced or manufactured by persons whose total production, if any, of such products during their most recent tax year has not exceeded thirty-one million (31,000,000) measured gallons." See Article 2 of Public Law 69. There is nothing in that text that would lead one to conclude that the intent of the legislator was to favor or promote local breweries. The exemption applies to all breweries with an annual production of less than 31,000,000 gallons, regardless of where the product is produced or sold.[11]

The Statement of Motives of Public Law 69 – which is the most important source when it is necessary to examine the purpose of a law, *Chevere v. Levis Goldstein,* 2000 J.T.S. 56; *PRTC v. Junta Reglamentadora de Comunicaciones,* 2000 J.T.S. 98 – confirms

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[11] Moreover, the amendment introduced by Public Law 69, which created a staggered system of taxes for small businesses, is a clear indication that the guiding criterion for the difference established by the special exemption is the breweries' volume of production and not the place of origin.

that the legislative purpose is that small industries that produce beer not carry the burden of the new tax until their annual production and economic capacity so justify. This is true because the legislators understood that that measure was necessary for small industries, regardless of whether they are from Puerto Rico or the United States or other countries, to "continue to operate unaffected."[12]

The plaintiffs request that we ignore this crystal clear legislative statement, because it is their understanding

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[12] With regard to the special exemption, the Statement of Motives states:

> Tax measures established through this measure cannot affect other areas of the economic base of the country. Therefore, in the case of beer, the mechanism supported by the Supreme Court of Puerto Rico in *U.S. Brewers Association v. Secretaria de Hacienda* 109 D.P.R. 456 (1980), is used to guarantee that industries with smaller productions can continue to operate unaffected. In those cases, as their production capacity increases and, as a result, their economic stability, their fiscal responsibilities gradually increase. In view of this, it is the public policy of the Commonwealth of Puerto Rico to take steps so that small beer-producing industries do not carry the burden of the new tax increase until their annual production and economic capacity can justify it. Specifically, it provides that beers produced in quantities less than thirty-one million (31,000,000) measured gallons a year shall be exempt from the increase in the tax until they achieve a specific annual production and, the tax shall progressively increase until it equals the percentage of the increase in the tax levied on larger producing breweries.

that it does not reflect the true intent of the law. In support of this request, in the Sworn Petition, they refer to only two statements offered by persons who are not legislators: the president of the India Brewing Company and the mayor of Mayagüez. In addition, on page 9 of the Request for Preliminary Injunction, the plaintiffs refer to statements made by two legislators, without giving the context or place where the statements were made. Neither the statements mentioned nor the statements of the two legislators alluded to, although they may be true,[13] would make it possible to conclude reasonably that the intent unequivocally stated by the legislators in the Statement of Motives is not the true intent of the law.

The statements mentioned in paragraph 44 of the Sworn Petition were made by two persons who are not legislators. The plaintiffs do not indicate any place in the legislative record that would even suggest that the positions assumed or the requests made in these statements were adopted by the legislators.

The statements made by the two legislators do not have any legal effect and do not justify setting aside the letter of the law and the legislative statement of its intent. Thus, "it is a generally accepted rule that the statements made by a legislator on the

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[13] The Sworn Petition does not contain any reference to these statements or to any other statements of the legislators. Although when considering both Motions for Dismissal, we are not obligated to presume that these statements were made, in effect we had done so for the purposes of this discussion.

floor of the legislative body to which he/she belongs are not sufficiently representative of the collective intent of the body that approves the statute." *Vázquez v. Secretario de Hacienda,* 103 D.P.R. 388, 390 (1975). Laws must be interpreted on the basis of what the Legislature did and not on the basis of what it failed to do, nor on the personal actions of one of its members." *Elicier v. Sucesión Cautiño.* 70 D.P.R. 432, 437 (1949).

Thus, the clear language of Public Law 69, as well as its Statement of Motives, unequivocally establish the intent of the legislators in establishing (and maintaining) the special exemption: that small beer-producing industries "not receive the burden of the new increase in the tax until their annual production and economic capacity can so justify." In view of such a convincing legislative statement and, even assuming that the statements and expressions of the two legislators referred to by the plaintiffs are contrary to what the law states, we cannot allow plaintiffs' intention to do away with the Statement of Motives of the legislative body to which they belong. To do so would have the effect of favoring the expressions or intentions of certain legislators over the expressions of the collective body, whose final expression was the result of the legislative debate that is usually colored by the expression of different and even contrary ideas within the same procedure. This has no support in the legal analysis required of this court. Moreover, to do so would give this court the dubious task of having to pass judgment on what

each of the 51 representatives and 27 senators thought at the time of voting on the floor. This interference with legislative intention is not appropriate, particularly when the letter of the law and its Statement of Motives are clear and precise. On occasions, we, in the courts, are called upon to examine the legislative debate to deduce intention, when the principal sources are absent or shed no light on some particular topic. That is not the situation before us now.

As we have seen, the plaintiffs also allege that the special exemption has discriminatory effects and, therefore, violates the Commerce Clause. This is because according to the Sworn Petition, it only benefits the local company, Cerveceria India, placing a higher tax on beer produced in the United States and foreign countries. In order to support their argument on the discriminatory effects of the special exemption, the plaintiffs base their argument on the case of *Bacchus Imports, Ltd., v. Días,* 468 U.S. 263, 270 (1984).

As we have explained, the law questioned in *Bacchus Imports* exempted the tax on two types of beverages produced *only* in Hawaii: the beverage "Okolehao," that is produced *solely* in Hawaii, from a plant that exists *solely* in Hawaii, and fruit wines that are also produced *solely* in Hawaii. *Bacchus Imports, Ltd., v. Días,* 468 U.S. at pages 265, 269, 271. In view of this undisputed fact, the Supreme Court of the United States concluded that "the effect of the exception is clearly discriminatory, in that it

applies only to locally produced beverages, even though it does not apply to all such products." Id. at page 271. This is not the case before us.

In the first place, the plaintiffs recognize that several imported beers currently benefit from the special exemption and others have benefited from it in previous years. Moreover, we take legal cognizance that beer is produced in all parts of the world and that there are beer-producing companies throughout the world whose annual production does not exceed 31,000,000 gallons. All of these companies can benefit from the special exemption "if they decide to sell their beers in Puerto Rico." *U.S. Brewers v. Secretario de Hacienda,* 109 D.P.R. at page 461.

Lastly, we reiterate that the Supreme Court of Puerto Rico rejected a similar argument in the case of *U.S. Brewers.* In that case, the plaintiffs alleged that the law was discriminatory since there were no local companies whose annual production exceeded 31,000,000 gallons. *United States Brewers Association et al v. Secretario de Hacienda,* 109 D.P.R, at page 460. The Supreme Court rejected that argument, among other reasons, because, "there are American breweries (Champale) and foreign breweries (Hofbrau) that pay the lower tax, and of the 34 members of the United States Brewers Association, 16 qualify to pay the lower tax if they decide to sell their beer in Puerto Rico." Id. at page 461. We do not see how this ruling can be seen as distinct even when the case of *U.S. Brewers* was resolved on the basis of Article 3 of the Federal Relations Act and equal protection of the law, but not

under the interstate Commerce Clause. The decision as to whether the law applies only to local companies and, therefore, has a discriminatory effect, is the same in either case.

In conclusion, we have no doubt that Public Law 69, and particularly the special exemption, do not violate the interstate and international Commerce Clause. As we have seen, it is an exemption that equally benefits all companies whose annual production does not exceed 31,000,000 gallons. This decision of public policy to promote or protect smaller companies so that they can compete better does not have the purpose or effect of discriminating against interstate or international commerce.

IV.

Since 1978, without interruption, the Legislature of Puerto Rico took the decision to levy a higher tax on breweries whose annual production exceeds thirty-one million (31,000,000) gallons than that levied on companies that produce less than that amount. The plaintiffs ask that we ignore the schedule designed by the Legislature and supported by our Supreme Court and, in its place, levy a tax on small breweries that differs from the one that the Legislature understood should be levied on them. There is not one single properly made argument in the Sworn Petition that would allow us to abrogate the power to change public policy that this tax schedule is intended to promote.

In view of the above, we issue judgment dismissing, the Sworn Petition in the case on record.

RECORD AND NOTIFY.

In San Juan, Puerto Rico, August 16, 2002.

[illegible signature]

MILAGROS RIVERA GUADARRAMA
SUPERIOR COURT JUDGE

I SO CERTIFY

CARMEN L. LOPEZ CRUZ
GENERAL CLERK

BY: ASSISTANT CLERK

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Barbara M. Cohen, of legal age, single, resident of Miami Lakes, FL., professional interpreter/ translator, certified by the Administrative Office of the United States Courts and an accredited member in good standing of the American Translators Association, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities

In San Juan, Puerto Rico, today, February 20, 2007.

/s/ Barbara M. Cohen
Barbara M. Cohen
ATABEX TRANSLATION SPECIALISTS, Inc
P.O. Box 195044, San Juan, PR 00919-5044

ESTADO LIBRE ASOCIADO DE PUERTO RICO
TRIBUNAL GENERAL DE JUSTICIA
TRIBUNAL SUPREMO

ASOC. PUERTORRIQUENA DE IMPORTADORES DE CERVEZ, I – PETICIONAR

VS.

E.L.A. DE PUERTO RIC/SECRETARIO DE HACIENDA Y OTR – RECURRIDO

CASO: CC-2003-0831
CASO ORI.: KPE-2002-1282 PROCEDIMIENTOS ESPECIALES
CASO CIR.: KLAN2002-1085 - - - - - - - - - - - - - - - -
ACCION CIVIL O DELITO

NIN TORREGROSA ANA M
PONCE DE LEON 252 SUITE 1801
CITIBANK TOWER
SAN JUAN PR 00918-2001

NOTIFICACION

- - - - - - - - - - - - - -

CERTIFICO QUE EN RELACION CON EL (LA) MOCION DE RECONSIDERACION EL TRIBUNO DICTO EL (LA) RESOLUCION QUE SE ACOMPAÑA:

CALAF LEGRAND FEDERICO [LIC.]
PO BOX 9022946 – SAN JUAN P R
00902-2946

FERRAIUOLI-HORNEDO, VERONICA [LIC.]
A-267 BANK TRUST PLAZA – 255 PONCE DE LEON
HATO REY PR 00917

HON. PROCURADOR GENERAL [LIC.]
DEPARTMENTO DE JUSTICIA – PO BOX 9020192
SAN JUAN, PR 00902-0192

MARQUES DIAZ JUAN A. [LIC.]
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PO BOX 4836 – CAROLINA, PR
00984

WALKER MERINO RAMON L [LIC.]
PO BOX 9023550 – SAN JUAN PR
00902-3550

SAN JUAN , PUERTO RICO A 04 DE SEPTIEMBRE DE 2007

LCDA. AIDA I. OQUENDO GRAULAU
SECRETARIA DEL TRIBUNAL SUPREMO

/s/ [Illegible] BETHZAIDA TORRES MORALES
SECRETARIO AUXILIAR

EN EL TRIBUNAL SUPREMO DE PUERTO RICO

Asociación Puertorriqueña de Importadores de Cerveza, Inc.; Heineken Brouwerijen B.V.; V. Suárez & Co., Inc.; Méndez & Co., Inc.; B. Fernández & Hnos., Inc. y Ballester Hermanos, Inc. Demandantes Peticionarios V. Estado Libre Asociado de PR; José A. Flores Galarza, en Capacidad Oficial como Secretario de Hacienda; Cerveceria India, Inc. y CC1 Beer Distributors, Inc. Demandados Recurridos	**Num.** CC-2003-831

SALA DE VERANO INTEGRADA POR EL JUEZ PRESIDENTE SEÑOR HERNÁNDEZ DENION Y LOS JUECES ASOCIADOS SEÑORES FUSTER BERLINGERI Y RIVERA PÉREZ.

RESOLUTION

San Juan, Puerto Rico, a 24 de agosto de 2007.

A la Primera Moción de Reconsideración presentada por la parte peticionaria, se declara no ha lugar.

Lo acordó el Tricunal y certifica la Secretaria del Tribunal Supremo.

/s/ Aida Oquendo
Aida Ileana Oquendo Graulau
Secretaria del Tribunal Supremo

[SEAL]

United States Constitution, Article 1, Section 8

The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Internal Revenue Code – Amendments

(H.B. 2244)
(Conference)

[NO. 69]

[*Approved May 30, 2002*]

AN ACT

To amend Sections 4002 and 4023 of Act No. 120 of October 31, 1994, as amended, known as the Puerto Rico Internal Revenue Code of 1994, in order to increase the tax on distilled spirits, wine and beer.

STATEMENT OF MOTIVES

The principal function of the Department of the Treasury is to ensure that the fiscal policy of the Commonwealth of Puerto Rico is equitable and just and to ascertain that collections covered into the General Fund through the imposition and collection of taxes are sufficient to meet the obligations and expense budgets of the government agencies and entities that render services to the citizenry.

It is of general knowledge that in the past year there was a serious problem regarding the lack of

over five hundred million (500,000,000) dollars to cover last fiscal year's budget, due to the high level of the public debt of the Commonwealth of Puerto Rico inherited from the past Administration. This situation forced the present Administration to establish alternate financing sources and develop some fiscal control measures that helped to comply with the Constitutional mandate of closing with a balanced budget.

At the same time, the economic situation the Island has endured has not been the most favorable one. During the 2002 fiscal year, the Island has faced an economic decline that had been anticipated since the beginning of the 2000 fiscal year, and which could have been foreseen by the past administration. The situation was further affected by the fear and changes in consumer trends exercised by many of our residents, and throughout the world, after the events of September 11, 2001, in New York City. Unfortunately, these circumstances significantly affected the structural deficit gap existing between the revenues and recurrent expenses legislated and approved by the past administration. All these circumstances together, which were beyond our control, had an adverse effect on the estimated collections for the General Fund. As a result, the present administration has had to reduce the budgeted recommended expenses by 4.17% and has had to identify resources from recurring sources.

In spite of the fact that the Government of the Commonwealth of Puerto Rico took extraordinary measures to promote and strengthen the local economy, in addition to fostering the use and consumption of products manufactured on our Island, these measures were not effective enough. The measures that we need to approve should not only balance the budget of the coming fiscal year, but should also guarantee financial solidity and the good credit of the Commonwealth of Puerto Rico. Therefore, we find ourselves in the need to once again assess the measures taken, as well as to seek other alternatives to collect funds for the treasury, providing that the good quality of life that our People deserve is affected in the least possible way. After an analysis of the different alternatives, it is hereby proposed to raise the tax on distilled spirits, wine and beer.

On the other hand, throughout the years there has been a constant and dramatic increase in the consumption of alcoholic beverages. We are aware that the excessive consumption of these products causes serious medical and social problems. Each day there are more drivers under the influence in our streets, being this [sic] one of the main reasons for fatal automobile accidents in our roads.

Alcoholic beverages, like cigarettes are not articles of basic need. Each year, the government incurs millionaire expenses to deal with social, emotional and economic problems produced by the excessive use of these products in our society.

We deem it necessary to recall that the taxes on alcoholic beverages have not been reviewed for approximately twenty (20) years, particularly the items regarding distilled spirits, wine and champagne, and the item regarding beer for twelve years. A raise in taxes on cigarettes and alcoholic beverages shall help the pertinent authorities to discourage, in great measure, the use and abuse of both. Furthermore, this raise would not have an adverse reaction in the universe of our taxpayers.

The tax measures established through this Act should not affect other areas of the economic basis of our Island. Thus, in the case of beer, the mechanism approved by the Supreme Court of Puerto Rico in *U.S. Brewers Association u. Secretario de Hacienda,* 109 D.P.R. 456 (1980) is used to guarantee that industries of less production may continue their operation without any alteration. In those cases, as their productive capacity increases, and as a result thereof, its financial stability, their responsibility before the public treasury shall also gradually increase. In view of this, it is the public policy of the Commonwealth to promote that small industries that produce beer do not suffer the burden of the new tax until their annual production and financial capacity justify it. Specifically it is provided that the beers whose production is less than thirty-one million (31,000,000) gallons measured annually shall be exempted from the tax raise until they achieve a determined annual production, and it shall be

increased progressively until it equals the percent of the increase of the tax levied on breweries of greater production.

This measure together with the public policy of controlling expenses effectively and achieving an increment in our Island's budget, while promoting the economic development of the local economy in general, and along with an efficient monitoring that the tax laws of Puerto Rico are complied with, will contribute to collect the funds needed to strengthen the economic resources of the Commonwealth of Puerto Rico.

Be it enacted by the Legislature of Puerto Rico:

Section 1. – Section 4002 of Act No. 120 of October 31, 1994, as amended [13 L.P.R.A. § 9521], is hereby amended to read as follows:

"Section 4002. – Taxing Provision

An internal revenue tax shall be levied, collected and paid at one time on the following products that are in a warehouse or that have been or may be, in the future, distilled, rectified, produced, manufactured, imported or introduced to Puerto Rico at the following rate:

(a) Distilled Spirits

(1) All that obtained through the fermentation and distilling of any product that is not derived from sugarcane shall pay a tax of thirty-one dollars and twenty-nine cents ($31.29) on each gallon

measured if said spirit has an alcohol content of less that one hundred degrees proof and on each gallon proof with an alcohol content of one hundred (100) or more degrees proof and a proportional tax at equal rate on each fraction of gallon measure or gallon proof.

(2) All that obtained through the fermentation and distilling of any products derived from sugarcane shall pay a tax of fifteen dollars and twelve cents ($15.12) on each gallon measured if said spirit has an alcohol content of less that one hundred (100) degrees proof and on each gallon proof with an alcohol content of one hundred (100) or more degrees proof and a proportional tax at equal rate on each fraction of gallon measure or gallon proof. Provided, that the taxes fixed in this Subtitle for spirits proceeding from products derived from sugarcane shall only be applicable when said spirits are pure, or when they have been mixed with spirits obtained from the fermentation and distilling of products not derived from sugarcane with an alcohol content not exceeding one hundred and twenty degrees proof, using the same as ingredients in a proportion that does not exceed two and a half percent (2½%) for the manufacture of rum and in a proportion of five percent (5%) for the manufacture of other liquors.

(b) Wines

(1) On those substandard quality wines whose alcohol content through fermentation has been

complemented through exclusive fortification with distilled spirits obtained through the fermentation and distilling of products derived from sugarcane, (excluding champagne and sparkling and carbonated wines, or imitation thereof) or any substitutes thereof, whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of one dollar and sixty-five cents ($1.65) per gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(2) On wine (excluding champagne and sparkling and carbonated wines) and cider, both imported whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of eleven dollars and thirty-five cents ($11.35) per gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(3) On all simple or carbonated tropical fruit wines whose alcohol content through fermentation has been complemented through exclusive fortification with distilled spirits obtained through the fermentation and distilling of products derived from sugarcane, and whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of sixty-two (62) cents per gallon measure shall be paid, and a proportional tax at an equal rate on every fraction of gallon measure.

(4) On concentrated must wines (excluding champagne and sparkling and carbonated wines)

whose alcohol content through fermentation does not exceed twenty-four percent (24%) per volume, a tax of four dollars and thirteen ($4.13) cents per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(5) Champagne and Sparkling Wine. –

(A) On champagne and sparkling, carbonated wines whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of thirteen dollars and seventy-five ($13.75) cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(B) On champagne and sparkling or carbonated concentrate must wines whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of five dollars and fifty ($5.50) cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(C) On champagne and substandard sparkling or carbonated wines whose alcohol content does not exceed twenty-four percent (24%) per volume, a tax of two dollars and twenty ($5.50) [sic] cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(c) Beer

(1) On all beers, malt extract and other fermented or unfermented analogous products, whose alcohol content is half of one percent (½ of 1%) per volume, and which does not exceed one and [a] half percent (1½%) per volume, a tax of seventy (70) cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure.

(2) On all beers, malt extract and other fermented or unfermented analogous products, whose alcohol content exceeds one and [a] half percent (1½%) per volume, a tax of four dollars and five cents ($4.05) cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure, except as provided in Section 4023 of this Subtitle.

(3) On all beers, malt extract and other fermented or unfermented analogous products, whose alcohol content exceeds one and half percent (1½%) per volume and is sold in containers of five or more gallons measure, a tax of four dollars and twelve cents ($4.12) cents shall be paid per each gallon measure and a proportional tax at an equal rate on every fraction of gallon measure, except as provided in Section 4023 of this Subtitle."

Section 2. – Section 4023 of At No. 120 of October 31, 1994, as amended [13 L.P.R.A. § 9574], is hereby amended to read as follows:

"Section 4023. – Special Exemption

(a) In lieu of the tax fixed in paragraphs (2) and (3) of clause (c) of Section 4002 of this Subtitle on all beer, malt extract and other fermented or unfermented analogous products whose alcohol content exceeds one and half percent (1½%) per volume referred to in paragraphs (2) and (3) of clause (c) of said Section, that are produced or manufactured by persons whose total production, if any, of said products during their most recent tax year has not exceeded thirty-one million (31,000,000) gallons measure, a tax shall be collected in the following manner:

Two dollars and fifteen cents ($2.15) per gallon measure produced, up to nine million (9,000,000) gallons measure;

Two dollars and thirty-six cents ($2.36) per gallon measure produced in quantities greater than nine million (9,000,000) but less than ten million (10,000,000);

Two dollars and fifty-seven cents ($2.57) per gallon measure produced in quantities greater than ten million (10,000,000) but less than eleven million (11,000,000);

Two dollars and seventy-eight cents ($2.78) per gallon measure produced in quantities greater than eleven million (11,000,000) but less than twelve million (12,000,000);

Two dollars and ninety-nine cents ($2.99) per gallon measure produced in quantities greater than

twelve million (9,000,000) [sic] but less than thirty-one million (31,000,000).

Subject to the provisions of Sections 4024 to 4028, the benefits of this Section shall apply for a person in any taxable year following the year in which the total production of the products described in this clause, if any, has not exceeded thirty-one million (31,000,000) gallons measure.

Section 3. – Transitory Provisions

(a) Every customs warehouse that on the effective date of this Act has in its custody distilled spirits, wines, champagne, sparkling wines and beer subject to the payment of the tax established in this Act, shall have the obligation to declare and pay the rates provided in this [Act] before removing said alcoholic beverages from the customs warehouse.

(b) All distilled spirits, wines, champagne, sparkling wines and beer that on the effective date of this Act are in stock in Puerto Rico, destined for sale and for which the internal revenue tax prescribed prior to the approval of this Act has been paid, shall pay an additional tax equal to the difference between the tax paid and the new tax levied by this Act.

(c) The Secretary of the treasury shall establish through regulations, circular letter or other administrative manner of general nature, the norms needed for the application of these transitory provisions.

Section 4. – Separability

If any section, subsection, clause, paragraph, subparagraph or any other part of this Act were declared unconstitutional by a Court with competent jurisdiction, the judgment issued to such effects shall not affect, impair or invalidate the remaining provisions of this Act, and its effect shall be limited to the section, subsection, clause, paragraph, subparagraph or part of this Act declared unconstitutional.

Section 5. – This Act shall take effect fifteen (15) [days] after its approval.

Approved May 30, 2002.

Internal Revenue Code – Amendments

(H.B. 450)

[No. 108]

[*Approved May 6, 2004*]

AN ACT

To amend subsection "a" and add subsection "c" to Section 4023 of Act No 120 of October 31, 1994, as amended, known as the "Puerto Rico Internal Revenue Code of 1994," in order to clarify the scope and legislative intent of its provisions.

STATEMENT OF MOTIVES

During 2002, several measures were approved with the main purpose of covering additional funds into the treasury. Among them, Act No. 69 of May 30, 2002, which amended the "Puerto Rico Internal Revenue Code of 1994", as amended, was included to increase the taxes imposed on distilled spirits, wines, and beers.

However, said Act guaranteed that beer industries of less production may continue their operations without any alteration, not receiving their tax raise burden until their annual production capacity so justify it. The legislative intent of said Act was that the tax increase would apply in a staggered manner to brewers whose annual beer production was of up to thirty-one million gallons measured. The tax would be increased gradually until it reached the percent of

the increase of the excise tax levied on the breweries with the larger production.

However, upon implementing the provisions introduced by Act No. 69, *supra*, it was provided for legislative interpretations on the tax treatment given to the beers whose production is less than thirty-one million gallons measured and whose products are not manufactured in Puerto Rico, but exported. Therefore, it is necessary to reaffirm that the legislative intent under Act No. 9, *supra*, is that the tax imposed under the provisions of Section 4023 of the Puerto Rico Internal Revenue Code of 1994, as amended, be applied in [a] uniform and staggered manner to the importers or introducers, of the beers produced by small beer companies outside the Commonwealth of Puerto Rico.

Be it enacted by the Legislature of Puerto Rico:

Section 1. – Subsection "a" of Section 4023 of Act No. 120 of October 31, 1994, as amended [13 L.P.R.A. § 9574], is hereby amended to read as follows:

"Section 4023. – Special Exemption

(a) In lieu of the tax fixed in clauses (2) and (3) of subsection (c) of Section 4002 of this Subtitle on all beer, malt extract and other fermented or unfermented analogous products whose alcohol content exceeds one and one half percent (1½%) per volume referred to in clauses (2) and (3) of subsection (c) of said Section, that are produced or manufactured by

persons whose total production, if any, of said products during their most recent tax year has not exceeded thirty-one million (31,000,000) gallons measured, a tax shall be collected in the following manner:

1. Two dollars and fifteen cents ($2.15) per measured gallon produced, up to nine million (9,000,000) measured gallons;

2. Two dollars and thirty-six cents ($2.36) per measured gallon produced in quantities greater than nine million (9,000,000) but less than ten million (10,000,000);

3. Two dollars and fifty-seven cents ($2.57) per measured gallon produced in quantities greater than ten million (10,000,000) but less than eleven million (11,000,000);

4. Two dollars and seventy-eight cents ($2.78) per measured gallon produced in quantities greater than eleven million (11,000,000) but less than twelve million (12,000,000);

5. Two dollars and ninety-nine cents ($2.99) per measured gallon produced in quantities greater than twelve million (9,000,000) [sic] but less than thirty-one million (31,000,000).

b. Subject to the provisions of Sections 4024 and 4028, the benefits of this Section shall apply for a person in any taxable year following the year in which the total production of the products described

in this subsection, if any, has not exceeded thirty-one million (31,000,000) gallons measured.

c. The benefits of this Section shall also apply to the importers of the products described in this subsection whose producers meet the requirements established in the previous paragraph."

Section 2. – This Act shall take effect immediately after its approval.

Approved May 6, 2004.

Editor's note: The official translation of Act No. 109 was unavailable at the time of publication.

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

UNITED STATES BREWERS ASSOCIATION, INC., et al Plaintiffs Vs. JULIO CESAR PEREZ Secretary of the Treasury, et al. Defendants	* * * * * * * * * *	Civil No.: PE-72-1137 RE: INJUNCTION AND DECLARATORY JUDGMENT

OPINION AND JUDGMENT

STATEMENT OF THE CASE

On July 18, 1978 Petitioners, U.S. Brewers Association, Inc. and breweries Anheuser Busch, Inc., Carling National Breweries, Inc., Miller's Brewing Company, JOS. Schlitz Brewing Company, and The F. & M. Schaefer Brewing Company, Inc., filed a request for injunction and declaratory judgment before the Federal Court for the District of Puerto Rico. They impeach the constitutionality of Act No. 37 of July 13, 1978 amending the Beverage Act of Puerto Rico to increase from $1.05 to $1.70 the excise tax on beer.[1] They allege on the color of authority that they

[1] The mentioned Act provides and what we consider to the matters brought up, the following:

(Continued on following page)

Article 1 – (b) and (c) of Item 4 of Article 6 are hereby amended and Article 21-A is added to Act No. 143, enacted on June 30, 1969, as amended, to read as follows:

"Article 6. –

There shall be imposed, collected and paid once on the following products which are deposited or which had been or could be hereinafter distilled, rectified, produced, manufactured, imported or introduced to Puerto Rico an income tax in the following rates:

1-(a) . . .

4-(a) . . .

(b) On any beer, lager beer, ale, porter, malt extract and other analogous fermented product or non fermented, whose alcoholic content would exceed one and one half percent (1½%) per volume, a tax of one dollar and sixty cents ($1.60) shall be charged for each gallon and a proportional tax at the same rate over each fraction of a gallon, except as provided in Article 21-A herein.

(c) On any beer, lager beer, ale, porter, malt extract and other fermented analogous product or non fermented whose alcoholic content would exceed one and a half percent (1½%) per volume and if sold in containers containing five (5) or more gallons, a tax of one dollar and sixty cents ($1.60) shall be charged per gallon and a proportional

(Continued on following page)

were deprived of the rights protected by the Fifth and Fourteenth Amendments to the Constitution of the United States.

They also claim rights under Section 8 of Article 1, Clause 2 of Section 3 of Article IV and Clause 2 of Article VI of the American Constitution, and the Civil Rights Act (48 U.S.C. 1983). They further allege that Act No. 37 violated the Federal Relations Act especially Sections 737 and 741(a) of Title 48 of the United States Code.

> tax on the equal rate of each fraction of a gallon, except as provided in Article 21-A herein.
>
> Article 21-A.-Special Exemption
>
> Instead of the tax provided in Items (b) and (c) of item 4 of Article 6 of this Act on any beer, lager beer, ale, porter, malt extract and other fermented analogous products or non fermented those alcoholic content would exceed one and one half percent (1½%) per volume mentioned in Items (b) and (c) of said Article, which are produced or manufactured by a person whose total production, if any, of said product during their most recent tax year had not exceeded 31,000,000 gallons, a tax of $1.05 shall be charged per each gallon and a proportional tax at the same rate for each fraction of a gallon. Subject to the provisions of Paragraph (A) and (E), the benefits of this Article shall proceed for any tax year of a person following that year in which its total production of the product described herein, if any, had exceeded 31,000,000 gallons.

In an opinion subscribed by the Honorable Juan R. Torruella, the Court understood, after harmonizing the jurisdictional prohibition of the Butler Act (48 U.S.C. 872)[2] with what is provided in Section 1341 of Title 28 of the United States Code,[3] that the imposed prohibition in Item 7 of Article 678 of the Civil Procedure Code, (32 L.P.P.R. 3524),[4] must be interpreted under the light of Act No. 12 of August 8, 1974, (32 L.P.P.R. 3524).[5] Faced with the uncertainty and doubt

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[2] This Act provides that:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

Even though it provides an anti injunctive remedy to bar the imposition and collection of taxes, its scope has been jurisprudentially flexibilized, establishing that the Federal Court may issue a writ of injunction to such purposes in special and extraordinary circumstances. See: Sancho v. National City Bank of New York, 112 F. 2nd 998 (1940); Paul Smith v. Buscaglia, 140 F. 2nd 900 (1944); Boyce v. Buscaglia, 77 F. Supp. 753 (1948).

[3] It prohibits the issuance of an injunction to bar the imposition or collection of a tax when "a plain, speedy and efficient remedy may be had in the course of such State."

[4] Establishes that no injunction could be granted nor an injunctive order "to bar the imposition or collection of any tax established by the laws of the United States or Puerto Rico."

[5] The mentioned Act, in its pertinent part, provides:

"There could not be an injunction nor an injunctive order:

1 . . .

2 . . .

3. To bar the application or observance of any Act from the Legislative Assembly of Puerto Rico or

(Continued on following page)

that the laws of Puerto Rico may provide an efficient and speedy remedy therein Plaintiff were ordered:

> "To seek, as they are hereby directed to do forthwith, a decision from the Commonwealth Court as to the issues raised in this case, and particularly, concerning the existence of an adequate right of action."

Based on this determination, and seeking the forum that would grant a fair, speedy and economic remedy, on August 3, 1978 Petitioner's filed before this Court a request for injunction and declaratory

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> the compliance of any action authorized by law of the Legislative Assembly of Puerto Rico, of a public officer, of a public corporation, or a public agency, or of any employee or officer of said corporation or agency, unless it had been determined by a firm and final, unappealable and irrevocable judgment that said act or authorized action by law is unconstitutional or invalid.
>
> Provided however that; the Court may issue a provisional injunctive order, a preliminary injunction or a permanent one subject to the terms of Rule 57 of Civil Procedures.
>
> 1. . . .
>
> 2. . . . When in the petition it's alleged that any person, under the authority of any law, ordinance, or regulation by the Commonwealth of Puerto Rico is depriving or be the principal of somebody depriving petitioner of some right, privilege or immunity protected by the Constitution or the laws of the Commonwealth of Puerto Rico or by the Constitution or laws of the United States of America that would be applicable to the person under the jurisdiction of the Commonwealth of Puerto Rico.

judgment. They requested the issuance of a provisional, preliminary and permanent injunction against Messrs. Julio Cesar Perez, Secretary of the Treasury and Luis Deynes Feijoo, Director of the Alcoholic Beverage Bureau of the Treasury Department, so they would abstain from imposing and collecting the tax established in Act No. 37. They further impeach, through declaratory judgment, the constitutionality of said Act.

In Paragraph 6 and 7 of the sworn complaint, Petitioners make the reservation of the federal claims to comply with the requirements in the case of *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964) and *Government and Civic Employees Organizing Committee v. Windsor,* 353 U.S. 364 (1957).

Petitioners allege that Act No. 37 amending Item 4(a) of Article 6 of Act No. 143 of June 30, 1969[6] and it also adds Article 21-A, is unconstitutional because by exempting beers manufactured in Puerto Rico from the imposed tax by this law there is a discrimination on behalf of local beer and against beers manufactured in the United States. They ground their petition in Section 1 of Article II of the Constitution of the Commonwealth of Puerto Rico which provides that "no discrimination at all may be established by reasons of origin . . . " They also invoke the clause of due

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[6] Known as the Beverage Act of Puerto Rico, 13 L.P.P.R. 6006, et seq.

process of law and of equal protection of law of Section 7 of Article II of our Constitution. They understand that "under the terms of this provision of the Constitution of the Commonwealth of Puerto Rico, the Legislative Assembly cannot use its taxing power to discriminate against beer produced by Plaintiff's brewers in the United States and on behalf of beer produced in Puerto Rico."

To establish the unconstitutionality of the statute, Petitioners resort to alleged statements about the House Bill 841,[7] stated by Honorable Jose Granados Navedo, by the President of the Board of Directors of India Brewery, as they were published in different newspapers of the country; to articles published in *El Mundo* and *San Juan Star*; to statements presented in public hearings held by the Treasury Committee of the House and the Senate and the Industrial Development Commissions of the House and Industry and Commerce of the House, as well; to reports filed before both Chambers of the Legislative Assembly by the Commission studying the Bill; and a preliminary study on the beer industry prepared in March 1978 by the Office of Economic Affairs of the Economic Development Administration. They allege that the enclosures mentioned above are part of the legislative history of Act No. 37. They understand that "the governmental authorities themselves responsible of the approval of this statute were in

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[7] Which became Act No. 37 of July 13, 1978.

charge of showing that the purpose of the same was that Plaintiff Brewers would suffer serious irreparable damage using ... the tax mechanism ... as protectionist mechanism."

Petitioners add that the resource of injunction is the only proper remedy they have at their disposal to bar the immediate and irreparable damage that Act No. 37 would produce over their economic position in the beer market since by not being a taxpayer they cannot take shelter under the reimbursement remedy of taxes established in Article 2 of Act No. 235 of May 10, 1949, as amended (13 L.P.P.R. 282). Nor can they take shelter under the remedy provided by Article 2 of Act No. 104 of June 29, 1955, Act on suits against the Commonwealth of Puerto Rico, (32 L.P.P.R. 3074 et seq.) because it limits the amount object of compensation to an amount which becomes too little when compared to the total amount of the irreparable economic damage Petitioners would suffer.

On the other hand, Respondents allege that the tax imposed by Act No. 37 falls on the beer locally produced as well as the imported beer. They allege that the law is constitutional since it establishes a reasonable classification in its Article 21-A where it provides a special exemption for manufacturers whose yearly production would not exceed 31,000,000 gallons and that it would also gather the requirement established in said article. They raise, among other things, as affirmative defenses: the Petitioners do not have the judicial capacity to file this cause of action; that some indispensable parties are missing; and they

question the capacity and authority of the U.S. Brewers Association to appear as representing all its members.[8]

After denying the request for provisional injunction on August 4, 1978 a hearing for the preliminary injunction was held. In order to prove the propriety of the issuance of the writ Petitioner rested in the facts alleged in the sworn statement. The Court, after hearing the parties positions, issued its resolution in open Court, denying the request by Petitioners considering that they had not presented sufficient evidence to sustain the writ. It determined that even though the averments of the sworn statement were true it is the duty of Petitioner to show that the writ should be issued.[9] It estimated that they had not complied with the requirements established the Supreme Court in *Puerto Rico Telephone Company v. Tribunal Superior,* 103 D.P.R. 200 (1975), and *Autoridad de los Puertos de Puerto Rico v. Tribunal Superior*,

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[8] Even though Petitioners in their answer raise these affirmative defenses they did not ground them or they did not provide any ground in the hearing nor in their memorandum of law. It shall not be the object of discussion in this opinion, the affirmative defenses of Respondent since it is the duty of the party to ground their statements. We consider that Petitioners have the judicial capacity to request the remedies of declaratory judgment and injunction for some constitutional rights involved which could be adversely affected.

[9] The request by Petitioner mainly rested on *Las Monjas Racing Corporation v. Comision Hipica Insular*, 67 D.P.R. 45 (1947).

103 D.P.R. 903 (1975).[10] The Court did recognize the right of Petitioners to request the issuance of an injunction under Act No. 12 of August 8, 1974 amending Article 678 of the Civil Procedure Code (32 L.P.P.R. 3524). Petitioners, as we stated, were not able to convince us that it was proper to grant the remedy requested. Finally August 11, 1978 was set for a hearing for the discussion as to the issuance of the permanent injunction and for the discussion of the statement as to the constitutionality of the Act. Respondents were ordered to present their responsive allegation and to make use of the discovery of evidence mechanism before the date set for the hearing.

In order to simplify and limit the litigations and to speed up the procedures, on August 11, 1978 the parties met in chambers with the undersigned Judge. In said meeting stipulation of facts were reached and documents to be marked as exhibits by each of the parties were submitted[11] and documents were presented which were considered as evidence shown, not

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[10] These rules were adopted from Wright and Miller, *Federal Practice and Procedures*, Vol. 11, pp. 430-431.

[11] The documentary evidence by Petitioner consisted of eleven (11) documents marked as Exhibits 1 to 11, mostly to show the legislative intention. Respondent presented as documentary evidence: the photocopies of the petitions for exemption filed by Champale and Hofbrau brewers; the transcript of the public hearing as to the House Bill 841; photocopy of a memorandum sent by the acting administrator of the Economic Development Administration to the presidents of the Legislative Commissions which studied House Bill 841; and some answers to the requests for admissions.

identified and not admitted.[12] We also heard the statements of the Legislative Assembly and from the *San Juan Star* opposing the presentations of officers and employees of the Legislature and of newspapermen as witness for Petitioners.[13]

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[12] Under this classifications the newspaper articles published in *San Juan Star* and *El Mundo* were considered. Said articles and newspapermen cited alleged statement by the Honorable Jose Granados Navedo, of Antonio Quiñones Calderon and of Luis Deynes Feijoo. Petitioners tried to establish that the Court could take judicial notice of such statement since the same are historical facts and of a general knowledge. We decided that the signature by the Governor of House 841 and its becoming law is the only fact on which we could take judicial notice.

[13] The representative of the Legislative Assembly grounded their opposition to the subpoena testificandum and the subpoena duces tecum issued to Officers Isabel Diaz de Torres and Nelson Soto in which the regulation of both Houses established that citation or that subpoena addressed to officers and employees of the Legislative Branch had to be made through the presidents of both Chambers. Nevertheless, the testimony of said officers was unnecessary for having admitted in evidence the documents requested by Petitioners.

Petitioners wish to use the newspaperman from *San Juan Star,* Tomas Stella, to establish the alleged statement that they understand could be part of the legislative history of Act No. 37. These statements were made to Stella by Luis Deynes Feijoo on the day the bill was filed. The position of the newspaper was grounded on the First Amendment of the Constitution of the United States and Section 4 of Article II of our Constitution. It was not shown that Deynes Feijoo was the intellectual author of the measure and given the fact that he had been summoned as a witness by Petitioner Stella was released from testifying, without prejudice that if it became necessary to summon him to impeach the testimony of Deynes Feijoo he would be.

On August 14 the case was submitted based on the stipulations and the documentary evidence presented. Petitioners were granted until August 21 to submit their memorandum of law and Respondent ten (10) days after the notice of the documents by Petitioners to submit the memorandum in support of their points of view. Additionally Petitioners were granted five (5) days, as of the date in which they were notified of the memorandum by Petitioner, to submit an additional reply memorandum.[14]

Based on the documentary evidence submitted[15] and of the stipulation by the parties, we formulate the following:

FINDINGS OF FACT

1. Petitioner United States Brewers Association, Inc. is a trade association incorporated under the laws of the State of New York and it represents thirty four (34) producers of beer sold in the United

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[14] Petitioner filed their first memorandum on August 21 and Respondent filed theirs on September 5, 1978. On September 13, 1978 Petitioners filed their reply memorandum.

[15] Due to the voluminous amount of documentary evidence submitted by both parties and which most of said documents were directed to prove the legislative intention, in the formulation of the finding of facts we have limited ourselves to make statements on the facts we consider of greater importance to solve the controversy brought up. However, the information contained in some of these documents shall be used in the discussion of the matters of law brought forth.

States. Anheuser-Busch, Inc. is a corporation organized under the State of Missouri and it has in this State its headquarters. Carling National Breweries, Inc. is a corporation organized under the laws of the State of Virginia and it has its headquarters in the State of Maryland. Miller's Brewing Company and Jos. Schlitz Brewing Company are incorporated in the State of Wisconsin and also they have in that State their headquarters. The F. & M. Schaefer Brewing Company is a corporation organized under the laws of New York and they also have their headquarters in that State.

2. Respondent Julio Cesar Perez is the Secretary of the Treasury of the Commonwealth of Puerto Rico and as such is empowered by Act No. 143 of June 30, 1969 (Beverage Act of Puerto Rico), to administer and enforce its provisions. Mr. Luis Deynes Feijoo is the director of the Alcoholic, Beverage Bureau of the Department of the Treasury and under the terms of Article 121 of Act No. 143 of June 30, 1969 (13 L.P.P.R. 6121) he manages the bureau.

3. Out of the thirty four (34) members of the U.S. Brewers Association, Inc., eighteen (18) of them produce more than 31,000,000 gallons of beer a year. Among these eighteen (18) members there are five (5) breweries; Petitioners who sell beer in Puerto Rico. They cannot take shelter under the exemption provided in Article 21-A of the Act because the yearly

production of each one of these eighteen (18) brewers exceeds 31,000,000 gallons of beer.[16]

4. The India and Corona breweries are local beer producers. Hofbrau Beer is produced in Germany and Champale in the United States. These four (4) breweries, under Article 21-A of the law, filed their petition of exemption at the Office of Tax Exemption and they are already enjoying the same.[17]

5. Corona and Champale breweries are members of the U.S. Brewers Association, Inc. but did not join individually to the present action.

6. Pabst Brewery, whose yearly production exceed 31,000,000 gallons, is a member of the U.S. Brewers Association, Inc. This brewery sells beer in Puerto Rico but did not individually join this action.[18]

7. The beer produced by the five (5) Petitioner brewers is imported to Puerto Rico by independent distributors. Tax from Act No. 37 is paid by these distributor importers.[19]

8. House Bill 841, filed on May 24, 1978, was an administration bill prepared by the Department of the Treasury.

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[16] Fact stipulated by the parties.

[17] Fact stipulated by the parties.

[18] Fact stipulated by the parties.

[19] In this litigation it is not necessary to determine whether the payment of this tax should be done by the retailer or the consumer.

9. The U.S. Brewers Association, Inc. filed this action on behalf and in representation of its thirty four (34) members, since it understands that the tax amendment to Item 4(a) of Article 6 of Act No. 143 of June 30, 1969 (Beverage Act of Puerto Rico) affects its associates in the economic position they have in the market, even when, in the case of beer imported to Puerto Rico, the tax of Act No. 37 is paid by the importer distributor. Five (5) breweries, members of the association, were joined separately to the suit because, likewise, they understand that they would be economically affected by the amendment to the Beverage Act of Puerto Rico. Petitioners estimate that the beer produced in Puerto Rico would sell at a lower price than the imported one, since this tax would fall on foreign beer (American and European) it shall cause on it an increase of the price at the consumer level. They believe then that the consumer shall prefer the beer produced locally and an economic damage shall be caused to Petitioner by the loss they would have in the market. Petitioners did not present any evidence to support these allegations.

10. When it was discussed at the public hearing House Bill 841, the U.S. Brewers Association opposed the additional tax of fifty five cents ($0.55) understanding that it was excessively high, but however understood that a twenty cent ($0.20) per gallon tax was reasonable on those brewers producing more than 31,000,000 gallons. The representative of the Association understood at that time that small breweries should be helped, but it opposed the tax of one

dollar and sixty cents ($1.60) which it considered excessive. See Pages 5-3 to 5-10 of the transcript of the public hearing held on June 2, 1978 before the Legislative Commission which studied the House Bill 841.

11. The U.S. Brewers Association, Inc. had its members support Bill No. 3605 of the House of Representatives of the Congress of the United States[20] which provide a tax relief to small domestic American breweries through a reduction in the production tax for the first 60,000 barrels of beer. Even though both legislative pieces-Public Act No. 95-529 and Act No. 37-gave help to the small brewing industry[21] the mechanism used to implement the measures are different.

This step by the U.S. Brewers Association does not affect our final determination at all.

Pursuant to the preceding Finding of Facts, the Court formulates the following:

CONCLUSIONS OF LAW

Through the Organic Letters of 1900 and 1917 the Federal Congress gave Puerto Rico similar powers to those of a State of the Union. Among said

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[20] On October 17, 1976 it became Public Law 94-529 (90 Stat 2485, 26 USC 1563 and 5051).

[21] For our determination on this point, see Pages 44 and 45 of this opinion.

powers was the one to impose taxes. In *Puerto Rico v. Shell Company,* 32 U.S. 253 (1927) on Page 261 and 262 the Supreme Federal Court stated that:

> "The purpose of the Foraker Act and the Organic Act was to grant Puerto Rico full powers of local self determination, with autonomy alike those of the States and incorporated territories. The result was to confer the territory many of the attributes of quasi sovereignty possessed by the States as for instance immunity against suit without its consent. Through these laws, the typical American governmental structure was erected consisting in three (3) independent branches-legislative, executive and judicial. A body politic-a commonwealth was created. *The power to impose taxes, the power to approve laws and enforce them and other governmental characteristic powers were granted and regarding local matters, as we have shown in relation to continental territories, legislative powers were granted almost as extents, even though not totally as those exercised by State Legislature.*"
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> Quotations have been deleted and emphasis supplied).[22]

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[22] Cited and translated *Puerto Rico Telephone Company v. Tribunal de Contribuciones,* 81 D.P.R. 982, 992 (1960).

Later on, pursuant to the compact with the United States[23] Puerto Rico was granted "tax faculties more ample than those of the States of the Union in partial compensation for its lack of representation in Congress." *Postley v. Secretario de Hacienda,* 75 D.P.R. 874, 897 (1954); *Rivera v. Buscaglia,* 146 Fed. 2nd 761 (1947).

Analyzing the relationship existing between the United States and Puerto Rico our Supreme Court tells us in *RCA Communications, Inc. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), on Pages 428 and 429 that:

> "Contrary to territorial regimes of the Foraker Act and the Organic Letter of 1917 the authority empowers merely delegated by Congress and subject to supervision, *the public and governmental powers of the Commonwealth of Puerto Rico in the authority which is their own, and is the most fundamental among them to impose a consubstantial tax with its creation itself as a political state and essential to its subsistence and for the survival of a State, come forth itself and from its own authority, and being this privative regarding the power to tax, it exercised this power free from a higher authority subject only to the limitation of its own Constitution and the Bill of Rights, which already Congress* determined that was

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[23] Public Act 600 of the 81st Congress of the United States, enacted on July 3, 1950.

> not contrary to the applicable provisions of the Constitution of the United States, *and to obligations the people imposed themselves by accepting federal relations that would exist and that exist today with the United States pursuant to Act 600.* It is true that Article 3 of the Federal Relations Act still has in it the residual statement of the fact that taxes could be imposed on property, etcetera . . . when it is for the purpose of the island and municipal governments. *But the basic power of taxing of the Commonwealth does not rest nor depends on that statement, characteristic of the prior epoch of delegated authority.* It is there because in its origin it was part of Article 3 of the Organic Letter of 1917, Article that from the beginning was essentially a regulation of federal relations with the United States regarding the imposition of taxes, and it still is under the Federal Relations Act reason for which it stood, particularly after the deletion of Article 3 by Act 87-121 of August 3, 1961, 75 Stat. 245, the matter related to lending margin." (Emphasis supplied)

The inherent power of our Legislative Assembly to impose taxes is evident. This power comes forth from Section 2 of Article VI of our Constitution and it's subject to the limitation imposed by our Constitution and by the Federal Relations Act.

The ample discretion the Legislature has in the tax field has been recognized for some time. *Miranda*

v. Secretario de Hacienda, 77 D.P.R. 171, 178 (1954). And the power of the Legislative Assembly is full to regulate this field. *Madden v. Kentucky,* 309 U.S. 83, 93 (1939). In this area more than any other the legislators have the greatest liberty to classificate (phonetic). *C.H. Vehicle Leasing Corp. v. ELA,* decided on March 31, 1978, 78 JTS 29; *Citizens Telephone Company v. Fuller,* 229 U.S. 322, 329 (1912). However, the Legislature may not use this power, which is not absolute, in an arbitrary or capricious manner. *Miranda v. Secretario de Hacienda, supra.* It is presumed that upon enacting tax laws the Legislature would act within the framework of their constitutional powers, even though, in the classification there is no exact equality. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). By creating the classifications, the action of the Legislative Assembly must be presumed valid. *Hermina Gonzalez v. Silva Recio,* decided on October 5, 1978, 78 JTS 71; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

The constitutional clause related to the protection of the laws does not bar the State from making a reasonable classification of property, persons or corporations, for the purpose of imposing taxes. *M.J. and S. Cabrera v. Sancho Bonet,* 58 D.P.R. 531, 536 (1941). But the classification and tax statutes must be reasonable, natural and based in a fair and rational criteria, rule or distinction. Nor can it be

arbitrary, oppressive, hostile, capricious, illusory or chimeric.[24]

In *Nebbia v. New York,* 291 U.S. 502 (1934) the Federal Supreme Court states that the guarantees of the due process of law only demand that a law not be unreasonable, arbitrary or capricious, and that the means selected have a real and substantial relationship with the purpose sought. Also it tells us that reasonability of each statute shall depend on the relevant facts.

Everything required to comply with the requirements of due process of law is that there is a sufficient nexus between the power of taxation of these States and the activities or events subject to tax, and that it is satisfied merely determining whether the State has offered or granted benefits, protections or advantages. *C.H. Vehicle Leasing Corp. v. ELA, supra*; *Libby, McNeill v. Secretario de Hacienda,* 82 D.P.R. 389, 397-398 (1961).

In order for a tax law to be unconstitutional under the due process of law clause the same must be so arbitrary that would result in a confiscation or in a crass and patent inequity or injustice. *C.H. Vehicle Leasing Corp. v. ELA, supra*; *Buscaglia v. Tribunal de Contribuciones,* 68 D.P.R. 345, 361 (1948).

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[24] See 71 American Jurisprudence 2d, State and Local Taxation, Sec. 175 and cases cited therein.

In a classification there cannot be an exact exclusion or inclusion of persons or things. *Magoun v. Illinois Trust and Savings Bank*, 170 U.S. 283, 295 (1698). A classification does not have to be made with scientific or mathematical precision. In the inclusion or exclusions of persons or things the rule of equality does not have to be absolute, but a substantial or reasonable precision is the criteria to follow. *Henderson Budge Company v. Henderson*, 173 U.S. 592, 614 (1898). In *Lindsey v. National Carbonic Gas Company,* 220 U.S. 61 (1911), on Pages 78 and 79 the Federal Supreme Court established the following rules to determine whether a tax law violates the constitutional clause guaranteeing the equal protection of laws:

> "The rules by which this contention must be tested, as is shown in repeated decisions of this Court, are these: 1. The equal protection clause of the 14th Amendment does not take from the State power to classify in the adoption of police law, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the

> time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

For a classification to be valid it's necessary that there is a reasonable basis. The classification has to be reasonably related to the object of the legislation and must be based in some distinction that could be rational and impartial which constitute the reason for the difference in taxes. *San Juan Trading Company v. Sancho Bonet,* 114 F. 2nd 969, 971 (1940).[25] The presumption of constitutionality can only be assailed with the most explicit showing that a classification is a hostile and oppressive discrimination against certain persons or by all classes. *Madden v. Kentucky, supra,* 88. He who impeaches a classification established in a law has the weight of the evidence to show that it does not rest on a reasonable ground and that it is essentially arbitrary. *Miranda v. Secretario de Hacienda, supra,* 179.

When the classification is not arbitrary and it rests on reasonable grounds, there is no discrimination by the fact that a tax is imposed on a class and another is exempted, different tax rates are imposed or exemptions be granted to some and not to others. *M.J. and S. Carrero v. Sancho Bonet, supra.* As to the

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[25] Cited and translated in *Miranda v. Secretario de Hacienda, supra,* 179.

classifications that are not arbitrary or affect in a discriminatory manner the taxpayers included in the classification or exemption, the legislative action must be sustained. *Rivera v. Corte,* 62 D.P.R. 513, 530 (1943).

The goal sought by the classification is important when determining the constitutionality of a tax statute only as serving to show that the discrimination is not denigrating. *Colgate v. Harvey,* 296 U.S. 404, 438 (1935).[26] A statutory discrimination would not be set aside if it could be reasonably conceived a situation of facts that would justify it. *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552, (1947). In *Nebbia v. New York, supra* it is established that:

> "It is equally clear that if the legislation policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the Courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the Courts are both incompetent and unauthorized to deal.
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> The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of necessity of

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[26] Dissident opinion by Justice Stone which is the prevailing one after *Colgate* was set aside by *Madden.*

> such an enactment, that every possible presumption is form of its validity, and that though the Court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

To determine the constitutionality of the statute at bar this Court understands that it must submit to scrutiny said piece of legislation and analyze the classification under the lights of one of the three (3) criteria or level formulated in the last years by the Supreme Court of the United States.

The acid test for the legislative classification has had a development that go from the traditional criteria up to the strict judicial scrutiny. *Hermina Gonzalez v. Silva Recio, supra.* In *Zachry International v. Tribunal Superior,* 104 D.P.R. 267 (1975), our Supreme Court, on Pages 277 and 278, analyzes two (2) of these criteria.

The first criteria, known as the minimum traditional analysis (traditional equal protection analysis), provides that a legislative classification should not be invalidated unless it's clearly arbitrary and no rational nexus could be established between the same and a legitimate interest of the state. Under this formula, it has been interpreted that a law is constitutional as long as it could be reasonably conceived a situation of facts that would justify the classification.

The second criteria, of a more recent creation and reaction to the in-satisfaction created by the first,

establishes that when the classification affects fundamental citizen rights and it's leaning against a suspicious classification, the same shall be subject to a strict judicial scrutiny. Suspect classification is that in which the classification has no relationship with the ability or aptitude of the person affected by the classification. The state has the obligation of showing the existence of a compelling state interest or one of a higher hierarchy that would justify the classification and that the same would necessarily promote the realization of that interest. This criteria has been applied to certain laws establishing suspicious distinctions, as those based on race, nationality, citizenship, poverty or birth.

Later on, in *Craig v. Boren,* 429 U.S. 190 (1976), the third criteria was structured corresponding to an intermediate analysis, more rigorous than the minimum traditional criteria, but lesser than the strict scrutiny. *Hermina Gonzalez v. Silva Recio, supra,* dissident opinion by the Presiding Judge. In *Craig v. Boren, supra,* the criteria or standard stated by the Court establish that the classification by reasons of gender may serve important governmental goals and must be substantially related with the obtention of said goals.

In the cases in which economic interests are involved the impeached statute shall be analyzed following the less rigorous scrutiny rules (minimum traditional criteria). *Craig v. Boren, supra,* 207; *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35, 47-48 (1966).

This being a tax character statute we shall analyze the piece of legislation under the light of the rules contained in the traditional analysis of the general statement stated above. But before entering in our discussion as to the constitutionality of Act No. 37 we believe it's pertinent to make some statements about the point of view of the parties as to the legislative intention.

When the law is clear and free from ambiguity, its letter must not be disregarded under the pretext of complying with its spirit. Article 14, Civil Code, 1930 edition (31 L.P.P.R. Section 14). It is also a general principle of law that the most efficient means to discover the real sense of a law, when its statements are doubtful, is to consider the reason and spirit of the same or the cause or motive that induced the legislative power to issue it. Article 19, Civil Code, 1930 edition (31 L.P.P.R. Section 19). It has been decided by our Supreme Court in *Rodriguez Rodriguez v. Gobernador*, 91 D.P.R. 101 (1964), that the clear text of the law is the statement by excellence of the legislative intention.

Petitioners cited extensive jurisprudence in support of their contention that we must refer to the legislative intention where it is shown that the purpose and reason of the Legislative Assembly members on approving the statute object of the constitutional attack was to discriminate on behalf of local industry against foreign industry. Said jurisprudence reiterates the general principal already cited, that faced with doubtful phrases or statements the Court shall

refer to the cause or reason that induced the legislative branch to issue said law. Likewise, they pretend that we consider as part of the legislative intention of Act No. 37 some explanatory memoranda by governmental agencies; statements by officers of the executive branch; statements by legislators who were members of the Commission studying the House Bill 841; the Bill drafted in the Department of the Treasury; and isolated phrase from an explanatory memorandum of another bill of law (House Bill 798); a study as to the beer industry performed by the Economic Development Administration; and statements, from private persons and officers of the executive branch, presented in the public hearings held on June 1 and 2, 1978 before the Legislative Commission that studied the House Bill 841. We understand that the preceding listing does not constitute part of the legislative intention because if we were to determine so we would be excessively widening the scope of a highly debatable criteria.[27] To recognize that the

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[27] As to legislative intention we are told in *Sutherland Statutory Construction,* Vol. 2A, Section 45.06:

> "Another legislative intent is a meaningful and valid concept for use as a criterion for deciding questions of statutory interpretation has been a classic subject of debate. Since an intention is a mental state and only individual persons have minds, only an individual can have an intention. It follows that the idea of a legislative intent must be regarding as a fiction or a figure of speech. Professor Radin, in a perceptive analysis has observed, further, 'that the intention of the legislature is undiscoverable in any real sense

(Continued on following page)

preceding list constitutes legislative intention it would be equivalent to conclude that the Legislature accepted without reservation nor analysis, nor any scrutiny nor discernment from its part, in the approval of Act No. 37.[28] A practice of this nature constitute a disregard of the legislative function and to the

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That chances that several hundred men each will have exactly the same determinate situation in mind as possible reductions of a given determinable, are infinitesimally small'. This view posits the concept of a legislative intent is useful only if it is understood as the sum of the individual ideas, views, and attitudes of all the members of the legislature. An incisive reply by Professor Landis posited in effect, that a legislative intent can be distinguished from the kind of subjective intent which is entertained by individual legislatures and that such a concept is a useful and productive one in the judicial process on questions of a statutory construction. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicating an intent on the part of the Legislature, is to disregard the realities of legislative procedure. Just as nobody ever saw the reasonably prudent man who is used as a standard of judgment in tort law, the extent of its use confirms that an abstract, non subjective, conception of legislative intent, as a reference to the composite or net meaning that is communicated by operation of the process of enactment applied to a statutory text, is a useful standard of judgment in statutory construction."

[28] Even when the House Bill 841 was originally drafted by an agency of the Executive Branch said project was studied by Legislative Commissions where amendments to the Bill prepared by the Treasury Department were made.

separation of powers, grounds and basis of our democratic system of government.[29]

In *Puerto Rico Telephone Company v. Tribunal de Contribuciones*, 81 D.P.R. 982 (1960) on Page 996, several elements of public policy were consigned which are the grounds for the legislative determination:

> "*The determination of the Legislature has as grounds several elements of public policy whose scrutiny is outside the jurisdiction of the Judges.* The approval of a tax measure requires a detailed study of difficult political, social and administrative problems and

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[29] Explaining the legislative process, R. Elfren Bernier in *Aprobacion e Interpretacion de las Leyes de Puerto Rico* states that after filing a bill at the Clerk's Office of any of the two (2) chambers, the president of the body where the bill originates refers it to the corresponding commission in order for it to study and return it with a written report with its recommendations. If the commission understands that it should consider the bill it would summon the authors, government officers or other persons that would like to hear about the same. Further, they may hold public hearings in order to obtain more information about the bill. In its report, the commission may recommend approval of the bill with or without amendments, that it be defeated or that it be left on the table of the commission. After the bill goes to the House for its consideration where the full text of the bill is read and the report of the commission. If the bill is approved it is referred to the Commission on Printing, Style and Preparation for their review of the language used and the style. The bill returns to the House for a final vote and if it is approved it is immediately sent to the other Chamber for its consideration where it follows identical steps that it followed in its original Chamber.

> above all, despite the economic effect of the new imposition on consumption, the investment, production, employment, income and savings." (emphasis supplied)

Even though we believe that the statute is clear in its face[30] and that there are no ambiguities nor doubtful phrases, when applying the rules with which a statute must comply so as not to violate constitutional clauses of equal protection of law and the due process of law it becomes necessary to refer to the legislative background of the law. It is indispensable in this scrutiny in order to determine whether there was a legitimate goal which involves the enactment of the instant statute; whether the rule or measure adopted is reasonable; and, finally, if there is a rational nexus or relationship between the goal and the measure.

We should not forget the statements of the Court of Appeals for the First Circuit in *Sancho v. Bacardi Corporation of America*, 109 F. 2d 57 (1940):

> "The legislative purpose to protect the renascent liquor industry of Puerto Rico from all competition by foreign capital, so as to avoid the increase and growth of financial absenteeism and to favor this domestic industry and to protect it against any unfair competition, was legitimate. And we may not strike down any legislation designed to effectuate

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[30] The parties also understood that from its face the statute is not unconstitutional.

such purpose just because it may be thought unlikely completely to accomplish the desired result. Whether the statutes prohibiting the use of certain trademarks and corporate names and whether the legislation forbidding shipments in bulk presumably passed in part to prevent an invasion of the trademark prohibition) will accomplish the desired result is not a question for our determination. The Legislature of Puerto Rico possessing "substantially all the local legislation powers of a state legislature, in all respects here involved" including the local police powers particularly applicable to the liquor business, have manifested its faith in the efficacy of its policy through three (3) successive sessions, the session of 1936, the special session of 1936 and the regular session of 1937, and it is not for us to say whether its faith is well founded. Even if we knew enough about the matter to form a judgment as to the wisdom of these statutes we should be exceeding our function were we to attempt to substitute our judgment for that of the Legislature. As said by the Supreme Court in Nebbia v. New York, 291 U.S. 502, 537, 54S.Ct. 505, 516, 78 L.Ed. 940, 89 ALR 1469 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the Courts are both incompetent and unauthorized to deal. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its

> validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power'." (Page 65)

Act No. 37 imposes in its first article a tax of $1.60 per gallon on every beer produced, manufactured, imported, or introduced to Puerto Rico. It establishes a special exemption to the beer produced or manufactured by persons whose beer production during the most recent tax year has not exceeded 31,000,000 gallons of beer; instead of paying the tax at $1.60 they shall only pay $1.05 per gallon of beer, subject that they comply with the granting of the exemption by the Office of Industrial Tax Exemption. Concessionaires must maintain the level of employment established in the granting of the exemption, taking as basis the level of employment prevailing as of May 31, 1978. Otherwise it shall be subject to the following alternatives:

> a) In the case of a concessionaire being forced to maintain a lower level of employment than the level required in the exemption, but not less than 90%, it shall be bound to notify this fact to the Director of the Tax Exemption Office, stating the reason that would justify the reduction.
>
> b) In cases in which the concessionaire being forced to reduce the employment level to an amount less than 90% from the level required in the exemption, through sworn petition they must a request before the Director of the Tax Exemption Office, with copy to the

Secretaries of the Treasury and Labor, justifying the reduction.

In both situations the director shall take into consideration the arguments alleged by the concessionaire to justify the need for the reduction of employment. The director may cancel the exemption in those cases in which the concessionaire would not comply with the corresponding alternative or may reduce the rate of exemption in proportion to the relationship existing between the number of employments reduced and the level of employment established in the concession.

The Legislative Assembly when considering House Bill 841 had before it some realities that supported the need of approving this bill. With said bill it was proposed, in addition to increasing the income of the public treasury, "to create a tax mechanism to protect the beer industry and to contribute to the creation of a climate of competition with the large scale beer industry." (Report on the Treasury Commission of the House of Representatives.)

This Court understands that in order to obtain a better perspective on Act No. 37 and the purposes that led the legislators to approve this statute, we must refer to the development of the beer industry in Puerto Rico. The information, to a large degree, was obtained from the *economic study of the local beer industry* prepared in March 1978 by the Office of Economic Studies of the Economic Development Administration. This report was presented as evidence by Petitioners (Exhibit 10).

The beer industry was originated in Puerto Rico in 1934 with the establishment of the Corona Brewery in San Juan. Three (3) years later India Brewery was established in Mayaguez. In the year 1949 Real Brewery was established, but it closed operations in the year 1958. Amstel Brewery was established in 1963 and due to the difficulties in penetrating the market it was forced to sell to Schlitz. Later on Schlitz, not obtaining sufficient market, was forced to close its operations in the 1969. Finally in the year 1968 the last attempt to establish a local brewery was made. In that year Criolla Brewery was established which subsisted in the market until 1973 when it also closed its operations.[31]

By the year 1937 this industry employed some hundred and eighty five (185) persons and it reached near 1,900 employees in 1969.[32] At present it provides direct employment to some 1,500 persons.[33] In November 1977 the average salary per hour paid to production workers in the beer industry was $3.37 and also, it paid its employees a weekly salary of $138 while the manufacturing industry by that date

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[31] Economic Development Administration, *Economic Study of Local Beer Industry*, Page 5.

[32] Ibid, Page 5-6.

[33] The mentioned report states on Page 16 that the alcoholic beverage industry employed in 1977 a total of 2,946. According to the information contained in the last census of manufacturing of the Labor Department, it is admonished that the local beer industry is responsible for more than half the total employment of the alcohol beverage industry.

by its laborers an average salary of $3.10 and paid a weekly salary of. $116.25.[34]

The beer industry is an important taxpayer to the public treasury since in addition of paying taxes on income when it has profits, it contributes on the property and municipal licenses, it pays significant excise tax on the sale of the product.

The magnitude of the contribution of the beer industry goes beyond its contribution to the Treasury since other industries depend on beer, among them: the can manufacturing industry, bottles, labels, carton and package containers. Also the service sector, even though to a lesser degree, is effected by the cost of the development of this industry.[35] It is estimated that for each employment generated in the beer industry an additional employment is created in different sectors such as services, commerce and Government, among others.[36]

The local beer market, quantified in 46.8 million gallons, represents more than double the market of fifteen (15) years ago, which came up in fiscal year 1962-63 to 22.4 million gallons.[37] While the yearly local production decreased from 21.2 million gallons in the fiscal year 1962-63 to 12 million gallons in the

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[34] Ibid, Pages 16-17.

[35] Ibid, Page 27.

[36] Ibid, Page 20.

[37] Ibid, Page 43. Information obtained from the Alcohol Beverage Bureau.

fiscal year 1976-77, the consumption of imported beer increased from 1.2 million gallons in fiscal year 1962-63 to 34.6 million gallons in 1976-77.[38] This information reveals that even though the total consumption of beer has gone up, beer manufactured in Puerto Rico had been consistently displaced by imported beer. In fiscal year 1962-63 the local beer production constituted 94.7% of the total market while for the months comprised between July and December 1978 it decreased to 26.5% after marking in that period a constant decrease in rhythm.[39]

In the year 1971 the Government took measures to counter address the crisis the local beer industry was going through when it was being gradually displaced by foreign beer. Since by that date only 45% of the beer produced locally supplied the beer market,[40] the General Program of Assistance and Promotion to the Beer Industry, was implemented which had been created by Joint Resolutions from the House No. 6 of July 7, 1971 and 15 of April 24, 1972.[41] The original resolution assigned to the Economic Development Administration four million dollars ($4,000,000) to be used during twelve (12) months in the development of this help program and the second resolution

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[38] Ibid, Page 44.

[39] Ibid, Page 49.

[40] Ibid, Page 8.

[41] Ibid, Page 10.

assigned four million dollars ($4,000,000) to be used in twenty four (24) months.[42]

The total of funds assigned to this program[43] a total of 7.4 million dollars ($7,400,000) was disbursed using publicity (32.2%), free beer (20.4%), expenses of advertising agency and vehicle expenses (11%), promotions (20.4%), exclusive concessions (1.1%), salaries of the marketing department (5.6%), quality control of the production (6.2%), and convenience packaging (3.1%).[44]

It is evident that there is a constant ascending trend in the local consumption of beer. It is also a reality the consistent form in which the imported beer in the last years have been substituting the locally produced beer. The differential in price does not constitute, as we see it, a determining factor in

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[42] Ibid. It was not possible to consider uses of funds for the improvement of industry in the long term due to the emergency situation at the time.

[43] The funds were disbursed to local breweries based on their production in the following manner:

> "To determine the amount of such disbursement the existing relationship between the amount of produced by each Petitioner in Puerto Rico each month shall be taken as basis, starting in the month of July 1971 and the total of beer produced in Puerto Rico during the same period, up to and inclusive June 30, 1972. The resulting percentage of said comparison shall be considered as the maximum monthly index of disbursement that a Petitioner may perceive after the month object of the comparison."

[44] Ibid, Page 11.

the preference of consumers, but rather this can be attributed to other elements, such as habit, propaganda, uses, etcetera.

The local beer industry is going through a crisis being displaced by imported beer. This gradual displacement not only affects the beer industry but other areas as well. Should this descending rhythm in the consumption of beer produced in the island continue the following could be harmed; the workers of this industry, increasing in turn, unemployment; the public treasury in the area of property taxes and income taxes; other industries, such as can manufacturing, bottles, labels, carton containers, etcetera; and other sectors among which we have service, trade and Government.

The local industry in an effort of obtaining a significant participation in the market, has reoriented its promotion campaigns and even the two (2) local breweries have changed their containers in order to compete more effectively with beer coming from abroad. Even though at the end of last semester our industry had a good season in which it reached in the month of November 42% in the local market, the situation continues being rather erratic and uncertain since by the month of December the consumption of locally produced beer went down to 24%.[45]

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[45] Ibid, Page 52.

It is impossible to analyze the constitutionality of a tax law within some theoretical concept since the reality involved is to be searched for. The real nature of a tax is set by its incidents and when it is in controversy the fact as to whether a tax violates guaranteed constitutional rights, it is not in the form itself, not by definition or interpretation what makes the case, but rather the practical effect or the consequences of said taxation as a matter of reality, in its application and functioning. *Maristany v. Secretario de Hacienda,* 99 D.P.R. 291, 300 (1967); *Commissioner v. Hansen,* 360 U.S. 446, 461 (1959). The tax controversy must be considered in the practical sense of the realities involved without entering into legal fictions or subtleties. *Maristany v. Secretario de Hacienda, supra.*

Within the framework of evolved reality is that we shall analyze into each Act. We consider that the purpose which inspired the Act is legitimate; the wish to try to protect and achieve the welfare of an industry that is going through a critical situation. This Act not only attempts to protect the local beer industry but that jointly serves as a protectionist mechanism to other industries and the public treasury. If the result of this Act would be to produce a situation in the preference or taste of the consumers, is not a criterion to be determined by a Court of Justice. Nor it is of our jurisdiction to determine whether the beer produced locally shall displace the foreign beer from the market. We understand that the two (2) prior

averments are subjugated by some subjective criteria such as taste, habit, use and consumer preference.

As concluding the legality of the wish of the Legislature it's necessary to analyze the reasonability of the classification, whether the measure adopted for the protection of the industry is the most proper one and the existing nexus between the goal sought and said measure. We must not forget that the reasonability of the statute, as stated in *Nebbia v. New York*, *supra*, shall depend on relevant facts. If the statute and the classification established comply with the requirement of due process of law and equal protection of the law we then could conclude that it has resisted the constitutional attack.

Act No. 37 takes as basis to establish the exemption the production of 31,000,000 gallons. In the report by the Treasury Commission from the House of Representatives it is stated that "studies performed have shown that the minimum recommendable size for a brewery to be economically viable is the production of 1.25 million barrels a year (38.75 million gallons), thus making economies in a moderate scale up to a maximum of 4.5 million barrels (139.5 million gallons) per year." We admonish that the basis taken to establish the exception is 7.75 million gallons less than the minimum recommendable for a brewer to subsist without economic difficulties. In order to make sure about the effectiveness of the measure an amount near to the one considered the recommendable minimum size of the brewery was taken as the basis.

Despite the fact that the joint production of both local breweries for the fiscal year 1976-77 was of 12.2 million gallons, we estimate that the amount taken as basis is reasonable for the exemption because it assures the long term effectiveness of the measure. After having analyzed the crisis through which our beer industry is going through and after having studied the measure adopted we believe that it is not in our power to substitute the amount taken as basis to establish neither the exemption nor the economic amount of the tax. We also understand and wish that we should not set aside the classification established by law considering that the same is not arbitrary, capricious, nor unreasonable, since it takes as basis what is considered as "recommendable minimum size for a brewery to be economically viable." The yearly production and consumption of each of our two (2) breweries show that economically they cannot subsist without help. The Legislative Assembly had before its consideration documents and information about the present state of the local beer industry. The crisis this industry is going through induced the Legislature to approve House Bill 841, being evident the desire to create a protectionist mechanism for local breweries. To try to help a local industry is not synonymous of discrimination.

A reading of the transcript of the public hearings held, from the study of the beer industry prepared by the Economic Development Administration, from the report of the Treasury Commission of the House, and the reports from both Legislative Chambers, show

that the intention was to assist the battered local beer industry. But from another part of the text of the Act at no time it expressly established that the exemption shall only be granted to local breweries, but that it established a uniform tax of $1.60 for all types of beers, being local, American or foreign. It established a special exemption for those breweries whose yearly production would not exceed 31,000,000 gallons. Despite that India and Corona fulfilled the requirements to take shelter under the exemption, also Champale and Hofbrau, American the first and European the second, also fulfilled said requirements. Presently these four (4) breweries are paying the tax of $1.05 per gallon. We must admonish that the exemption is not unconditional because the same is subject to the maintenance of the employment levels established before the granting of the exemption. This requirement warranties the job protection of the workers working in this industry helping in such a way to fight unemployment. Failure to comply with the employment level establishing at the granting of the exemption, the director of the Tax Exemption Office it does not consider the reasons adduced from the reduction as valid may cancel the exemption.

For our final determination on Act No. 37 it is necessary to ask ourselves whether the purpose of achieving a solution to the existing problem, the Legislature could have opted for another measure leading to achieve the same purposes. Let us see:

The Legislative Commissions that studied House Bill 841 had before their consideration the report

prepared by the Economic Development Administration, to which we have referred on several occasions. This report on its Pages 12, 13, 14, 57 and 58 proposes a series of alternatives which could remedy the situation of the Puerto Rican beer industry.

The first of the alternatives proposed by the Economic Development Administration would give some governmental subsidies to the production cost. Among these, the Administration proposed the following: to reimburse 25% of the payroll paid to the production and dispatcher workers; a maritime fee reduced for the importation of raw materials (grains, empty cans, labels and others); an exemption of consumption tax of 6% on labels, plates, empty cans, etcetera, a special rate of the use of electric energy and water consumption; and a tax exemption on the personal property in those articles subject to the payment of that tax (cartons, plates, labels, cans). Any of these proposals in order to be effective, as those who drafted the report understand, would have to become a subsidy of a permanent character, a thing which is not desirable for any type of industry. Also some of them represent an outlay for the Government because it would turn out to fail to receive additional funds. Comparing any of these measures with Act No. 37 it can be seen that the exemption established in this piece of legislation is effective until the limit is reached or whenever the level of the set employment is not complied with.

Another of the alternatives contained in the mentioned report proposes a health program and

promotion through incentives to local breweries. This incentive would allow the reduction in price of the beer produced in the island. This measure, as per the opinion of the drafters of the report, would not be recommendable because it would have to be of a temporary character and the industry needs long term solutions.

The last alternative proposed is that of the tax differential. Under the alternative three (3) proposals were studied; a tax of $1.05 for beer canned, produced or imported in containers of more than 5,000 gallons and when the same is canned, produced or introduced in containers of less than 5,000 gallons it would pay a $1.60 tax; approval of an act similar to Act No. 3605 enacted by the Congress of the United States; and the measure proposed in Act No. 37.

Act No. 37 establishes a differential in taxes based on the formula analyzed above. The Legislature could have selected any of the three options contained in the third alternative. We understand that it was its criteria to make the selection of the measure considered to be the most appropriate while it is our exclusive function to determine the constitutional validity of the Act. We believe that even when any of the other two measures contained in the third alternative be completely valid the formula adopted is not less valid which in turn consigns a fair and rational criteria. Also the purpose of the law is in harmony with the police power of the state and its inherent power of imposing taxes and establishing classifications. The classification therein contained was established taking

a reasonable basis such as the size required for a brewery to be economically viable. Having the means selected a real and substantial relationship with the purpose sought it is forceful for us to decide on behalf of the constitutionality of Act No. 37.

Petitioners in the case at bar have not shown that the classification made by the Legislature does not rest on a reasonable ground and it is essentially arbitrary. Nor have they shown that there is no rational nexus between the measure and the interest of the state. They have merely limited themselves to allege that the classification denies to them equal protection of the law and the due process of law and adds that the intention of the Legislative Assembly was to discriminate against them based on their origin. These allegations are not sufficient to invalidate the Act. He who impeaches the constitutionality of an Act has the weight of the evidence to show that the same does not rest on a reasonable ground but that it's arbitrary, and that it discriminates against it. *Miranda v. Secretario de Hacienda*, *supra*, 179-180.

The averment by Petitioners that the statute violates the constitutional warranty that laws shall not discriminate for reason of origin lacks foundation and it is frivolous. These constitutional warranties, clearly shown in the first section of our Bill of Rights, has the purpose of guaranteeing certain rights to the human being and not to judicial persons.

The substantive proposition of the Bill of Rights propose a text of the first section of the Bill of Rights that:

> "The dignity of the human being is inviolable. All men are equal before the law. There could not be any discrimination based on race, color, gender, birth, social origin, political or religious ideas. Laws as well as the public education system shall embody these principles of essential human equality."
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> (Emphasis supplied) 2nd Diary of Sessions of the Constituting Convention of Puerto Rico 1101.

After that, the Delegate Padron Rivera proposed that "social origin" be substituted as it appeared in the original text by "social origin or condition."[46] This was the only amendment made to that section and in such a manner it was approved.

It is evident that the name "origin" referred exclusively reserved to natural persons for being used in a context that restrictively alludes to human beings. In such a manner it was interpreted by Mr. Delegate Gutierrez Franqui by stating that "the word 'persons' includes natural persons, as well as judicial persons, but not so the word 'men'."[47] The Delegate

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[46] 2nd Diary of Sessions of the Constituting Convention of Puerto Rico 1381.

[47] 3rd Diary of Sessions of the Constituting Convention of Puerto Rico 2296. In order to warranty the equal protection of laws to judicial persons Delegate Gutierrez Franqui suggested

(Continued on following page)

Gonzalez Blanes understood that "discrimination against what should not be established is against the origin of the individual."[48]

Based in the prior analysis we understand that Act No. 37 does not violate the provisions contained in Article 1st and 7th of our Bill of Rights and therefore we sustain its constitutional validity.

It is true that Petitioners, in their attack to the constitutionality of Act No. 37, do not invoke Section 3 of the Federal Relations Act in its prohibition of not establishing any discrimination on behalf of articles produced or manufactured in Puerto Rico and against similar products imported from the United States. This Court understands that we should analyze the amendment to the Beverage Act of Puerto Rico under the light of said Section 3. Given the nature of the matter regulated it is necessary to also refer to the 21st Amendment to the United States Constitution.[49]

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that the section should read: "All men are equal before the law and no person in Puerto Rico shall be denied the equal protection of law." The Bill of Rights in our Constitution warranties judicial persons the same protection under the law in a seventh section.

[48] Ibid, Page 2246.

[49] Section 3 of the Federal Relations Act was one of the federal rights reserved by Petitioners pursuant to Paragraph 6 and 7 of the petition. It is necessary to analyze in this opinion Act No. 37 under the light of the 21st Amendment and Section 3 of the Federal Relations Act in order to determine which of the two (2) provisions must rule.

Through the 21st Amendment it states that territories or possessions of the United States are allowed that which was forbidden by the 18th.[50] The 21st Amendment provides, in its second section that:

> "The transportation or importation of alcoholic beverage to any State, Territory or possession of the United States, to deliver or use in the same, in violation of the laws therein effect, is hereby forbidden."

We shall start analyzing whether the 21st Amendment applies to Puerto Rico.

The relationship between Puerto Rico and the United States has been described as one without parallel in the history of the nation. That relationship, as it has been shown throughout history, has varied and evolved thus responding to the reality of time. Let us see:

In the year 1901 the Federal Supreme Court in *Downes v. Bidwell,* 182 U.S. 244, considered Puerto Rico as a non incorporated territory.[51] Then in *Puerto Rico v. Shell Company, supra,* it was stated that the

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[50] The 18th Amendment provided in its first section that:

> "After one year from ratification of this amendment, the manufacture, sale or transportation within, as well as the import or exportation from the United States and every territory subject to its jurisdiction, of alcoholic beverages."

[51] Being a non incorporated territory it's only applicable to its citizen the provisions related to fundamental rights contained in the Bill of Rights of the American Constitution.

purpose of the Foraker Act and the Organic Act was to grant to Puerto Rico the powers of local self determination with an autonomy similar to that of the States and the incorporated territories.

The Commonwealth has its genesis in 1950 in Public Act 600,[52] 81st Congress. In *Pueblo v. Terry Terrol Torres Lozada,* decided on December 14, 1944, Associate Justice, Mr. Diaz Cruz stated:

> "The body politic that eventually founded by mutual consent between the Congress and the people of Puerto Rico is not a federated state even when in maintaining itself within the constitutional structures of the United States. Its foundation responded to ethnic, cultural and geographical differences, so that it is considered as an unique entity in which with limited incidents, laws as well as the principle of federation operate in a manner different to the uniform ruling which governs the United States." (Citations omitted)

Resolution 22 of the Constituting Convention, enacted on February 4, 1952, as paraphrased on Pages 422 and 423 in *RCA Communications, Inc. v. Gobierno de la Capital, supra,* stated that "in accordance with the mandate received from the people, the Constitution is to be adopted in which the Puerto Rican community shall be politically organized; which was necessary to properly designate in the English

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[52] In Title Act Providing for the Organization of a Constitutional Government for the people of Puerto Rico.

and Spanish languages, the body politic thus created; that the word "*Commonwealth*" in the English language and its contemporaneous use means a politically organized community, in the generic sense, a state, in which the public power unappealably resided in the people, and thus it was a free state, but linked to a wider political system, in a federated association or otherwise federal, and therefore did not live independently and separately; that said word "*Commonwealth*" clearly defined the status of the body politic being created pursuant to the agreement reached between the people of Puerto Rico and the United States, that is, that of a free state of authority higher in the exercise which was privative thereof, but that was linked to the United States of America, was part of its political system in a harmonious manner with the federal structure of the system; that the Spanish translation of the word in English "*Commonwealth*" required a compound statement sufficiently wide to state the concept and the liberty of the association of the states; that that statement was "estado libre asociado"; that in the case of Puerto Rico the most proper translation of "*Commonwealth*" was "estado libre asociado", but that the translation to Spanish as "associated free state" was not proper inasmuch as "state" meant in the United States one of those integrating the Union; that the body politic created by the Constitution would be known in English as "the Commonwealth of Puerto Rico" and in Spanish as "the Estado Libre Asociado de Puerto Rico", and it was provided at the text of that resolution was to be amply distributed along with the Constitution for the

knowledge of the people of Puerto Rico and the Congress of the United States."

The *sui generis* situation of Puerto Rico within the American federated system has been recognized in *Mora v. Mejias*, 115 F. Supp. 610 (1953); *Wackenhut Corporation v. Rodriguez Aponte*, 386 U.S. 268 (1967); *Calero Toledo vs. Pearson Yacht Leasing Company,* 416 U.S. 633 (1974); and in *Examining Board of Engineers v. Flores de Otero,* 426 U.S. 572 (1976).

Nevertheless, we must point out that pursuant to Public Act 87-189 of August 30, 1961 (75 Stat. 417; 28 USCA 1257) it was provided that the final decision of the Supreme Court of the Commonwealth of Puerto Rico be reviewed by the Supreme Court of the United States to the same extent that it is permissible to review in last instance the decision from the States of the Union. See, also, Rule 62 of May 30, 1963 of the Federal Supreme Court.

On several occasions it has been brought before the Federal Supreme Court whether it is applicable to Puerto Rico the 5th or the 14th Amendment, but consistently the Supreme Court has decided that it's not important to decide which of the said amendments is applicable. See *Examining Board of Engineers vs. Flores de Otero, supra.*

Resuming this unique situation Associate Justice, Mr. Negron Garcia, states in *Pueblo v. Terry Terrol Torres Lozada, supra,* that:

> "This unparallel relationship can entail, as a matter of fact it entails, that Puerto Rico has prerogatives and powers that the Federal Constitution denies the States of the Union. As an example, under Section 3 of the Federal Relations Act, Puerto Rico has the power to impose taxes on imports, power which is denied to the States by Item 2 of Section 10 of the Constitution. And under Sections 9, 28, and 58 of said Act not all the federal laws necessarily apply to Puerto Rico and specifically the tax nor interstate trade nor those conflicting with said Federal Relations Act apply to Puerto Rico. The States, however, cannot escape the application of Federal tax for being part of the Supreme Law of the nation. *Barton v. United States*, 202 U.S. 344, 368 (1906)."

Since 1898 Puerto Rico has been considered as a non-incorporated territory; it was granted, later on, an autonomy similar to that of the States as a non-incorporated territory; in the year 1952 it became a Commonwealth or community; and on occasion treatment of a state has been extended. It clearly comes forth for this Court that under any of the political formulas annunciated by the 21st Amendment – State, territory or possession – the same is applicable to the Commonwealth of Puerto Rico. Nevertheless, we understand that due to the provision contained in Section 3 of the Federal Relations Act which bar the establishment of discrimination on behalf of products manufactured or produced in the island and due to the fact that this Act regulates the

federal relations existing between Puerto Rico and the United States, we must refer to that piece of legislation in order to determine whether the 21st Amendment or the mentioned Section 3 should prevail.

Section 3 of the Federal Relations Act, in its pertinent part, states that:

> "No distinction between articles imported from the United States or foreign country and similar articles produced or manufactured in Puerto Rico shall be made."

With the 21st Amendment the American Congress pretended to liberate the States from the traditional restrictions imposed by the Interstate Commerce clause when regulating the importation of alcoholic beverage destined to the use, consumption or distribution with their jurisdiction. *United States v. State Tax Commission of Mississippi,* 412 U.S. 363 (1973).

About the 21st Amendment Senator Blaine, president of the juridical commission which studied the Joint Resolution of the Senate No. 211 proposing the amendment to the Constitution to set aside the 18th Amendment, stated the following:

> "Section 1 is a straight, outright repeal of the 18th Amendment. Section 1, if it is incorporated in the Joint Resolution, submitted by the Congress, and ratified by the necessary States, will entirely eliminate the

18th Amendment from the Constitution. I need not discuss that section.

Then we have suggested and offered Section 2, which provides as follows:

The transportation or importation into any *State, Territory* of *possession* of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.

Mr. President, in agreeing to that section I think the committee was unanimous that the language used would effectuate the purpose that is obviously designed by Section 2. It is claimed, however, and I think with some degree of assurance for the future, that Congress now has the power to pass laws to protect the so-called dry States in regulation of interstate commerce over intoxicating liquors. A great many laws on that subject have been enacted.

In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

Mr. President, the pending proposal will give the States that guarantee. *When our*

Government was organized and the Constitution of the United States adopted, the States surrendered control over, and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity-namely, intoxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather, by reason of this provision, in effect acquires powers that it has not at this time.

The committee felt that since the Congress had acted and had definitely legislated upon this question, while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designated by Section 2.

I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors." Congressional Record, Volume 76, Part 4, pp. 4140-4141. (Emphasis supplied)

Evidently it comes forth the transcript of the report of the judicial commission of the Senate the intention that the State would regulate commerce only as to alcoholic beverage, being under the exclusive control of Congress to regulation of interstate commerce over the other articles. The Clause 2 of Section 10 of Article 1 of the Constitution was still in effect as to every product other than alcoholic beverage.[53]

In *Craig v. Boren, supra,* on Page 206, it is stated that since 1933, date on which said amendment was approved, the Supreme Court had reiterated that the amendment creates an exception to the functioning and normal application of the Commerce Clause. See *Hostetter v. Idlewind Bon Voyage Liquor Corp.,* 377 U.S. 324, 330 (1964); *Carter v. Virginia,* 321 U.S. 131, 139-140 (1944); *Finch & Co. vs. McKittrick,* 305 U.S. 395, 398 (1939).

It is added in *Craig v. Boren, supra,* that:

> "The 21st Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision 'be considered in

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[53] It states that:

> "No state may, without the consent of Congress, set taxes or fees on imports or exports, unless where absolutely necessary to enforce its inspection laws; and the net product of all the fees and taxes to be set by any State over imports and exports, shall engross the Treasury of the United States. All these laws shalt be subject to review and in intervention by Congress."

> the light of the other, and in the context of the issues and interests at stake in any contract case'." *Hostetter v. Idlewind Bon Voyage Liquor Corp., supra,* 331; cf *Department of Revenue v. James Beam Distilling Co.,* 377 U.S. 341 (1964); *Collins v. Yosemite Park,* 304 U.S. 518 (1938).

It is decided in *State Board of Equalization of California v. Young's Market Corp.,* 299 U.S. 59 (1936) that under the 21st Amendment the States may even prohibit the import of alcoholic beverage that would not comply with the requirement established by local laws. On Page 62 it is stated:

> "The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. *To say that, would involve not a construction of the Amendment, but a rewriting of it.*" (Emphasis supplied)

And at Page 63 the following rhetorical question appears:

> "Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations or discourage importation by laying a heavy impost, or channelize

desired importations by confining them to a single consignee?[54]

In *Mahoney v. Joseph Triners Corporation*, 304 U.S. 401 (1938) it was decided based on *Young's Market, supra,* that a classification acknowledged by the 21st Amendment cannot be prohibited by the 14th.

The statute impeached in the *Young's Market, supra* which imposed a requirement to possess a license to be able to import beer as well as the one impeaching *Mahoney, supra* which bar the importation of alcoholic beverage containing more than 25% alcohol if the trademarks hadn't been registered at the Patent Office, were declared constitutional considering that it did not violate the equal protection of the law. See *Indianapolis Brewing Company v. Liquor Control Commission,* 305 U.S. 391 (1939) and *Finch v. McKittrick, supra.*

Despite this ample judicial interpretation of the amendment we refer to, the interpretation has been restricted on occasions when trying to harmonize its provisions to the Commerce Clause. In *Department of Revenue v. Beam Distilling Company,* 377 U.S. 341 (1964), citing *Low v. Austin,* 12 Wall 29, the Federal Supreme Court states that the "the goods imported do not lose their character as imports, ... until they

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[54] See *Parks v. Allen,* 426 F 2d 610 (1976); *Hornsby v. Aliens,* 326 F 2d 605 (1964); *Avion Export Co. v. Cook,* 318 Supp 1076 (1970).

have passed from their original cases. Whilst retaining their character as imports, a tax upon them, in any spare, is within the constitutional prohibition. It also states that:

> "We have no doubt that under the 21st Amendment Kentucky could not only regulate, but completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost of these imports from abroad."

The dissident opinion by Justice Black, in this case on whom Judge Goldberg joins, strongly criticized this deviation for the purposes of the amendment. It invokes prior decisions of the Court where it recognized that the power of the State to regulate that matter was not limited by the Commerce Clause nor by the equal protection of the law clause. It believes that much less the import and export clause would limit the power of the States.

The fifth clause of Section 9 of Article I of the American Constitution establishes a prohibition that "no taxes shall be imposed on articles exporting from any State."

Even though this clause is not extensive to Puerto Rico, the compliant of the same is warranted in Section 3 of the Federal Relations Act when it is provided that "no fee whatsoever on exports coming from Puerto Rico shall be imposed nor collected."

On the other hand, said article of the American Constitution in Clause 2 of Section 10 states that "no state may, without the consent of Congress, set taxes or fees on the imports or exports, unless when it is absolutely necessary to enforce its inspections law . . ." Contrary to this provision, in Section 3 of the Federal Relations Act it is established that "the Internal Revenue taxes which in accordance to the power granted by this Act would be imposed by the Legislative Assembly of Puerto Rico, on any articles, or merchandise may be imposed and collected on articles subject to said tax, as determined by the mentioned Legislative Assembly, as soon as the same has been manufactured, sold, used or imported to the island . . . "[55]

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[55] Despite that pursuant to Section 3 of the Organic Letter of 1917 the Congress of the United States granted the people of Puerto Rico legislative powers to impose and collect taxes on income, it was not made possible in such date the imposition and collection of taxes as soon as the taxable article had been introduced or imported to the island. On March 4, 1927 through an amendment to the Organic Letter of 1917 the Congress empowered Puerto Rico to impose taxes on products imported to our jurisdiction, *Texas Company (P.R.) Inc. v. Tribunal de Contribuciones de Puerto Rico*, 82 D.P.R. 134, 141-42 (1961).

The authority granted by Congress through the Butler Amendment,[56] to the people of Puerto Rico to impose a local tax on imported articles be they from the United States or foreign countries as soon as they were imported, (subject to the only condition of uniformity) is independent from federal customs laws and regulations. This fiscal power is also independent from the original package doctrine. *Texas Company (P.R.), Inc. v. Tribunal de Contribuciones de Puerto Rico*, 82 D.P.R. 134, 146 (1961).

In *Texas Co. (P.R.) Inc. v. Tribunal de Contribuciones de Puerto Rico, supra,* on Pages 197 and 198 it is stated what was decided by the Federal Supreme Court in *West India Oil Company v. Domenech,* 311 U.S. 20, 27-28 (1940):

> "The evident purpose of the words in this 'whereas' is that any tax authorized by the Organic Letter on articles of domestic production may be imposed equally regarding imported articles as soon as the same had been manufactured, sold, used or imported to the island under the only condition that there would be no tax discrimination on articles introduced from the United States or foreign countries and domestic articles. The amendment seems to be caused by doubts arising over whether the merchandise brought to the island from the United States would be subject to local tax while in its

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[56] It amended on March 4, 1927 the 1917 Organic Letter.

original packages, and also whether the merchandise had while under the domain of Customs authority, the same status regarding local tax as merchandise coming from foreign country under the same Customs domain and whether the power of the local Legislature to tax articles imported from foreign countries was something greater than that prohibited to the States by Clause 2, of Section 10 of Article I of the Constitution, to tax articles imported or exported without the consent of Congress. S. Rep. No. 1011, 69th Cong., 1st Sess., Page 2, Cf. Sonneborn Bros v. Cureton, 262 U.S. 506, with Baldwin v. Seelig, 294 U.S. 511, 526 . . .

Also practical difficulties were experimented in the imposition of local taxes on articles upon their arrival from the United States and while they were under the custody of Postal or Customs officers due to the fact that the local tax that in their practical effect is a Customs right was not collected by Postal or Customs officers – S. Rept. No. 1011, 69th Cong., 1st Sess. – the doubts and difficulties were removed by the amendment to Article 3, granting the congressional consent to have the merchandise subject to the jurisdiction of the Puerto Rican Legislature as soon as they were introduced to the island from the United States as well as from foreign countries, and provided that Customs officers from the United States and its Postal Service would assist local officers in the collection of their taxes. The effect of the ample language of the amendment was not only

> subject to tax all the merchandise imported, be it from the United States as well as a foreign country, but also to neutralize the normative effect of the Customs laws and their regulations as far as the same protected the articles from local taxing since their arrival. The merchandise in its original package was thus submitted to taxes when introduced in the island without consideration at all of any Customs regulation. It was also evident that any other merchandise that was not in its original package was left in not more favorable condition, and in the presence of the ample and clear language of this statute we cannot say that the one, more than the other, is immune to local tax.

It is evident the power of the Legislative Assembly of Puerto Rico to impose taxes over all kinds of articles, effects or merchandise. The taxes will be imposed and collected, as provided by the Legislature, once the article has been manufactured, sold, used or imported to the island.

The faculty of our Legislative Assembly to impose taxes is not limited by the restriction of Clause 2 of Section 10 of Article I of the American Constitution. That which is prohibited to State Legislatures is allowed to our Legislature: the power to impose tax on imports. That its power is full to impose taxes on articles imported to our jurisdiction.

In accordance to Article 2 and 4 of Public Act 600 some disposition of the Act to provide a civil government for Puerto Rico and other purposes (Organic

Act) enacted on March 2, 1917 were left in effect. This provision of the Organic Act of 1917 which were left in effect constitute the Federal Relation Act with Puerto Rico. So then, the Federal Relations Act covers now the following articles of the Organic Letter of 1917, as amended: 1, 2 (part), 3, 5, 5b, (doubtful), 6, 7, 8, 9, 10, 11, 36, 37 (part), 38 (part), 41, 42, 44, 45, 46, 48, 54, and 58.

Section 3 of the Federal Relations Act comes from therefore 1917, while the 21st Amendment to the United States Constitution was approved by Congress in 1933 and enacted by the Secretary of State in 1934. Even though when in 1950 the Puerto Rican people accepted in a general referendum the articles that were left in effect in the Organic Letter of 1917, said articles were known since then as the Federal Relations Act, and nothing affects our determination since the Legislative Assembly has full powers to impose taxes on articles, effects, or merchandise once the same has been manufactured, sold, used or imported to this jurisdiction. The power of the Commonwealth of Puerto Rico to impose taxes is unquestionable.[57] Nevertheless, pursuant to the already mentioned clause of Section 3 of the Federal Relations Act, the Legislative Assembly cannot discriminate on behalf of articles produced or manufactured in the island and discriminate against those similar products imported from the United

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[57] See *WAPA TV Broadcasting Corporation v. Secretario de Hacienda*, decided on March 9, 1977.

States. We understand that this clause exclusively refers to all those articles or merchandise other than alcoholic beverages since pursuant to the 21st Amendment, the Legislature may freely regulate the restriction in the area of alcoholic beverages.

The Court of Appeals for the First Circuit in *San Juan Trading Company v. Sancho,* 114 F. 2d 969 (1940), affirmed the decision of the District Court for the District of Puerto Rico. The District Court understood that the distinctions between square matches and round matches was unreasonable because there is no substantial relationship between the classification and the purpose of the tax statute inasmuch as it violated the 14th Amendment and Section 3 of the Organic Letter. Defendant, the Treasurer of Puerto Rico, supported its contention on the constitutionality of the impeached statute citing the cases *Mahoney v. Triner Corp., supra,* and *State Board v. Young's Market Co., supra.* The Appeals Court Judge who subscribed the opinion understood that:

> The cases cited by the Defendant do not uphold his contention that it is permissible to discriminate against non domestic products. *Mahoney v. Triner Corp.,* 1938, 304 U.S. 401, 58 S Ct. 952, 82 L Ed. 1424 and *State Board* v. *Young's Market Co.,* 1936 299 U.S. 59, 57 S Ct. 77, 81 L Ed. 38 are decided exclusively on the ground that discrimination as to liquor is expressly authorized by the 21st Amendment to the United States. The peculiar legislative power to regulate the liquor business is sufficient also to differentiate *Sancho*

> *v. Bacardi Corporation of America,* 1 Cir., 1940, 109 F. 2d 57, from the case before us, as well as the fact that the classification therein was found to be reasonable in order to protect the renascent liquor industry of the island from competition by foreign capital, so as to avoid the increase and growth of financial absenteeism. That case is by no means authority for the proposition that tax differentials between likes or similar articles of Puerto Rican and non Puerto Rican manufacture may be made solely for the purpose of promoting local industry."

The Appeals Court refused to apply these two cases because some statutes involved on alcoholic beverage subject to special regulations by the 21st Amendment.

Based on the intention of Congress of leaving in the hands of the States, territories or possessions the exclusive regulation of alcoholic beverages and the inherent power to impose taxes of our Legislative Assembly, we understand that the 21st Amendment should rule over the already discussed clause of Section 3 of the Federal Relations Act. Said amendment, 21st, is after the purpose that the States, territories or possessions would have total authority, free from limitations to approve laws regulating alcoholic beverages.

Puerto Rico, once the mentioned amendment was extended, exercised the power to regulate the area of alcoholic beverages free from any restriction. The

limitation in the Federal Relations Act is extensive only to those merchandises or articles other than alcoholic beverages.[58]

The constitutional validity of Act No. 37 is clear under the provisions of the due process of law and the equal protection of law of our Constitution as well as under the 21st Amendment of the United States Constitution.

Lastly, even when the preceding determination sustain the constitutional validity of Act No. 37 it becomes moot any pronouncement regarding the petition for injunction, we believe necessary to make some statements as to that petition.

The seventh paragraph of Article 678 of the Civil Procedure Code (32 L.P.P.R. Section 3524) which says that no writ of injunction may be granted to bar the collection of taxes established by the laws of the United States or Puerto Rico. But nowhere else in our Supreme Court has it limited this remedy to those cases in which it clearly appears that the tax is illegal, that the taxpayer lacks a proper remedy in law, that the tax would cause irreparable damage or that it would bring forth multiplicity of suits. *Cafeteros de Puerto Rico v. Tesorero,* 74 D.P.R. 752

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[58] It should be pointed out that in Puerto Rico, the tax on beer is paid once the merchandise arrives at the piers or, later on, as it is being taken out of the bonded warehouse. The tax falls on the beer that is to be consumed or used in our jurisdiction.

(1953); *Cooperativa de Cocheros v. Tesorero,* 59 D.P.R. 226, 230 (1948); *Hernandez v. Buscaglia,* 60 D.P.R. 596, 598-99 (1942); *Los Diablos v. Sancho Bonet,* 54 D.P.R. 658, (1939); *Plaza Provision Company, Inc. v. Benitez,* 51 D.P.R. 657, 664 (1937); *The Texas Co. v. Domenech,* 50 D.P.R. 432, 453 (1936); *Durlach Bros. v. Domenech,* 47 D.P.R. 654, 659 (1934).

In addition, Petitioners had at their disposal the local forum since Act No. 12 of August 8, 1974, amending Article 678 of the Civil Procedure Code, supra, allowed for the issuance of a writ of injunction in those cases in which a violation of constitutional rights is alleged.[59] As shown by specific facts that irreparable damages will be caused the Petitioners alleged that: (a) the tax differential of fifty five cents ($0.55) would increase the price of imported beer at the consumer level at least in ten cents ($0.10) in all kinds of containers; (b) from the 46.8 million gallons consumed in Puerto Rico during the fiscal year 1977-78, 12 million gallons were produced locally; (c) the report by the Commission of the Treasury of the House of Representatives points out that the participation of beer manufactured by enterprises making more than 31,000,000 gallons would be reduced to 60% of the market as a result of the enactment of Act. No. 37; (d) Petitioners would have a loss of 25.4

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[59] For the interpretation of this Act, see Pearson Muller v. Feijoo, decided on April 12, 1978, S. de Miranda v. Feijoo, decided on January 12, 1978 and Otero Martinez v. Romero Barcelo, decided on November 30, 1978.

gallons a year in the gross value in the market of imported beers; (e) based on Table 21 of the Report by the Economic Development Administration Petitioners estimate that Act No. 37 would produce a loss of 6.7 gallons or 3.5 million cases of ten (10) ounces for Petitioners which at the price of $7.05 is equivalent to a loss of $24.6 million in the gross value of sales in the Puerto Rican market.

As already stated, Petitioners did not present any evidence to support the preceding averments. For such reason we denied the issuance of the preliminary injunction since they did not comply with the requirement established in *Puerto Rico Telephone Company v. Tribunal Superior, supra,* and *Autoridad de los Pueblos de Puerto Rico v. Tribunal Superior, supra.*

We must conclude then that the permanent injunction is not proper since it was subject to a prior determination on the constitutionality of Act No. 37. Having determined the constitutionality of the Act it becomes unnecessary for a discussion on the merits of the writ.

JUDGMENT

Pursuant to the preceding Findings of Fact and Conclusions of Law, the Court hereby issues judgment as follows:

1. Act No. 37 of July 13, 1978 is hereby declared constitutional and valid.

2. The complaint is hereby dismissed, without any special imposition of costs or attorney's fee.

TO BE REGISTERED AND NOTIFIED

In San Juan, Puerto Rico today December 12, 1978.

Signed,

(sgd.) CARMEN SONIA ZAYAS
Superior Court Judge

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR (COURT) SAN JUAN SECTION

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS; Coors Brewing Company; and Heineken Brouwerijen N.V. Plaintiffs, vs. Commonwealth of Puerto Rico, represented by Anabelle Rodríguez in her official capacity as Secretary of Justice; José A. Flores Galarza, in his official capacity as Treasury Secretary; India Brewery; and CC1 Beer Distributors. Defendants	Case No. KPE 2002-1282 Re: Provisional Remedies; Declaratory Judgment and Request for Preliminary and Permanent Injunction

SWORN PETITION

TO THE HONORABLE COURT:

The above captioned Plaintiffs, represented by their respective undersigned attorneys, very respectfully state, allege and pray:

1. This petition is filed under Article I, Section 8 of the Constitution of the United States (Commerce Clause) and Article 3 of the Federal Relations Act of the Commonwealth of Puerto Rico, 1 L.P.R.A., Federal Relations Act of Puerto Rico § 3, 48 U.S.C. § 741a.

2. Declaratory and injunctive relief is requested under the Puerto Rico Rules of Civil Procedure 59 and 57 and the Injunctions Act of Puerto Rico, Art. 675 *et seq.* of the Code of Civil Judicial Procedure of Puerto Rico, 32 L.P.R.A. § 3521 *et seq.*

THE PARTIES

3. Plaintiff, Puerto Rican Association of Beer Importers, ("A.P.I.C."), with offices at 365 San Francisco Street PH, San Juan, Puerto Rico 00901, Registry No. 39,591, is a non-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico, whose purposes, among others, include promoting the stability and development of the Puerto Rican industries dedicated to the distribution of imported beers. Its members include the companies Méndez & Compañía, ("Méndez"), exclusive distributor for Puerto Rico of the imported beers Miller Genuine Draft, Miller Lite, Heineken, Amstel Light, Champale Malt Beverage, and Sky Blue Malt Beverage; V. Suárez and Company ("V. Suárez"), exclusive distributor for Puerto Rico of the imported beers Coors Light, Presidente, Bass Ale, and Samuel Adam(s); B. Fernández & Brothers, Inc., ("B. Fernández"),

exclusive distributor for Puerto Rico of the imported beers Budweiser, Bud Light, Busch, and Busch Light; Ballester Brothers, Inc. ("Ballester"), exclusive distributor for Puerto Rico of Corona beer. The members of A.P.I.C. are all corporations organized and existing under the laws of the Commonwealth of Puerto Rico.

4. Plaintiff, Coors Brewing Company ("Coors"), PO Box 4030/NH 335, Golden, Colorado 80401, employer identification number 84-1150943, telephone 303-277-3402, fax 303-277-7373, is a corporation organized and existing under the laws of the state of Colorado, which manufactures in the United States and sends through interstate commerce its brands of beer Coors Light for sale in Puerto Rico through its exclusive distributor, V. Suarez. Coors manufactures in excess of 31,000,000 gallons of beer.

5. Plaintiff, Heineken Brouwerijen N.V. ("Heineken"), PO Box 28, 1000 AA, Amsterdam, The Netherlands, telephone 011-31-20-523-9239, fax 011-31-20-626-3503, is a corporation organized and existing under the laws of Holland, which manufactures and sends through international commerce its Heineken brand beer for sale through its exclusive distributor in Puerto Rico, Mendez. Heineken manufactures in excess of 31,000,000 gallons of beer.

6. Plaintiff, V. Suárez & Company, Inc. ("V. Suarez"), PO Box 364588, San Juan, Puerto Rico 00936-4588, telephone 787-792-1212, fax 787-782-4557, employer identification number 66-0178790, is a corporation organized and existing under the laws

of the Commonwealth of Puerto Rico, with its main business offices in Bayamón, Puerto Rico. V. Suárez is the exclusive distributor in Puerto Rico of the Coors Light brand.

7. Plaintiff, Méndez & Company, Inc. ("Méndez"), PO Box 363348, San Juan, Puerto Rico 00936-3348, telephone 787-793-8888, fax 787-277-5779, employer identification number 66-017198, is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its main business offices in Guaynabo, Puerto Rico. Méndez is the exclusive distributor in Puerto Rico of the Heineken brand.

8. Plaintiff B. Fernández & Brothers, Inc. ("B. Fernández"), PO Box 363629, San Juan, Puerto Rico 00936-3629, telephone 787-288-7272, fax 787-288-7290, employer identification number 66-0209073, is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its main business offices in Bayamón, Puerto Rico. B. Fernández is the exclusive distributor in Puerto Rico of the Budweiser, Bud Light, Busch, and Busch Light brands.

9. Plaintiff Ballester Brothers, Inc. ("Ballester"), PO Box 364548, San Juan, Puerto Rico, telephone 787-788-4110, fax 787-788-6460, employer identification number 66-0175269, is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its main business offices in Bayamón, Puerto Rico. Ballester is the

exclusive distributor for Puerto Rico of the Corona brand.

10. The Commonwealth of Puerto Rico (C.P.R.) is the constitutional entity that governs the island. Its legislative branch submitted, duly approved, the law involved in this litigation, which was approved by the governor in the exercise of the executive power. The C.P.R. is represented, under law, by the Secretary of Justice, in her official capacity.

11. The Secretary of Justice of the Commonwealth of Puerto Rico is the legal representative of the Commonwealth of Puerto Rico, and is charged by law to represent the C.P.R. and its officers in their official capacity, whenever the constitutionality of a law, or the official acts of its officers in the discharge of their duties is challenged. At present, the office of the Secretary of Justice is held by the Honorable Anabelle Rodríguez.

12. The Treasury Secretary of the Commonwealth of Puerto Rico is the officer of the Executive Branch charged by law with administering the tax laws of the central government. It is in this official capacity that he is included in this complaint. The office of Treasury Secretary is currently held by Juan Antonio Flores Galarza.

13. India Brewery is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, which carries out, among other commercial activities, the manufacture of the Medalla Light and India beer brands for sale for profit, directly or

through its exclusive distributor in Puerto Rico, CC1 Beer Distributors. It is included in this complaint as an interested party or one that could be affected by the remedies requested.

14. CC1 Beer Distributors is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware, with its main business offices in Florida, and authorized to carry out business in the Commonwealth of Puerto Rico, which exclusively distributes the Medalla Light and India brands manufactured by the local brewery. Also by information and belief, it is alleged that CC1 Beer Distributors is the exclusive distributor of Coca-Cola in Puerto Rico. It is included in this complaint as an interested party or one that can be affected by the remedies herein sought.

NATURE OF THE ACTION

15. This action is not filed to prevent the collection of taxes by the Treasury Secretary.

16. This action is also not filed to dispute the validity of the excise tax laws or to detain the flow of taxes recognized as necessary to carry out governmental activities and to assist in balancing the operational budget of the C. P. R.

17. The legislation that is the object of the present action contains severability provisions that allow the continued enforcement and application of those of its sections or articles that do not suffer from

constitutional defects or are contrary to laws of a superior rank.

18. This action seeks the nullification, as contrary to the Federal Relations Act of Puerto Rico and the Commerce Clause of the United States Constitution, of those sections of the law that create an exception to the tax rate in favor of a private manufacturing enterprise of Puerto Rico, to the detriment of international and interstate commerce and of the proprietary interests of other local, U.S., and foreign companies, which are suffering and will continue to suffer irreparable damages. In the meantime, said exception limits, instead of increasing, the benefits for the people of Puerto Rico that the legislation is intended to achieve, according to its statement of purpose.

19. In effect, and as will be alleged, the legislation in question creates a discrimination of such nature that it practically eliminates the right of consumers to acquire the beer of their choice and leads to a state-sanctioned monopoly in favor of the only local producer and its exclusive distributor.

20. It is requested of this Honorable Court that, in an expedited fashion, and after carrying out the appropriate procedures, the Court decree Article 2 of Law No. 69 of May 30, 2002, 13 L.P.R.A. § 4023 illegal and unconstitutional.

STATEMENT OF FACTS

Brief history of the beer industry prior to 1969

21. The beer manufacturing industry in Puerto Rico began in 1934 with the establishment in San Juan of the now defunct Corona Brewery. Corona was followed by India Brewery, in Mayaguez, which was founded in 1937 and continues operating today. From 1949 to 1958, a brewery by the name of Real Brewery maintained operations in Puerto Rico. Amstel Brewery operated on the island for a brief period of time, from 1963 to 1969. In similar fashion, from 1968 to 1973, Criolla Brewery also operated in this market.

22. Until the decade of the 1960s, local manufacturers enjoyed a virtual monopoly of the local beer market and had practically no competition from imported beers. In early 1963, Puerto Rican distributors began importing foreign beers, particularly from the United States. Nonetheless, locally produced beer comprised 95% of the beer market in Puerto Rico. By 1969, however, the market share of producers from outside of Puerto Rico increased to 30%.

23. The Puerto Rico Legislature immediately began to adopt measures to support the local producers. In 1969, the Legislature approved Law No. 143 of June 30 of the same year, 13 L.P.R.A. § 6001 *et seq* with the express purpose of collecting taxes for public works. Nonetheless, its discriminatory intent to protect local products was clearly stated in its Statement of Purpose. The proscribed purpose of protecting the local beer manufacturers to the exclusion and

detriment of the manufacturers and Puerto Rico distributors of beers imported to Puerto Rico was written down with the approval of this law.

The beer industry in Puerto Rico from 1969 to 1973

24. Despite these legislative efforts to protect the local beer industry from the competitive forces of the market, the market share of local breweries declined further to 41.6%.

25. The Legislature decided again to assist the local beer producers and approved measures that injected millions of dollars into these enterprises between 1971 and 1973. See General Program of Aid and Promotion of the Beer Industry and Joint Resolutions of the House of Representatives No. 6 of July 7, 1971 and No. 15 of April 24, 1971.

26. Concurrently with those subsidies, the Legislature increased taxes on beers by 40%, from $0.65 and 0.75, to $1.05 by gallon. See Law No. 7 of July 2, 1971, 13 L.P.R.A. § 6006. This tax only affected imported beers, because the Program described above subsidized the cost of the tax for local producers.

27. These efforts were fruitless, since by late 1973, the market share enjoyed by the local industry had been reduced to 30%. Corona Brewery underwent a labor strike that substantially reduced the local

beer production from 1973 to 1974, from 21.5 million gallons to 12 million gallons.

28. Because the injection of funds into the local beer industry and the protection from the effect of the excise taxes did not achieve the desired result, the Government attempted other alternatives. Regulations were promulgated to control the packaging, bottling, size, and color of the beers so as to dissuade importers from outside of Puerto Rico from coming into this market. See Regulation to Establish Standards to Follow in the Labeling of Containers, Specify their Volume, and Prohibit the Use On Beers Not Produced in Puerto Rico of Any Word that Might Imply They Were Manufactured In Puerto Rico. This Regulation, as amended, was promulgated on December 1974 and again amended on July 1984. In summary, the Regulation contained requirements on size, shape, color, and glass engraving, which required that all importers manufacture bottles specially made for Puerto Rico. Although on its face, the Regulation did not state purposes, the Treasury Secretary administratively expressed as one of its central purposes, the stimulation of the vigorous growth of the native alcoholic beverage manufacturing industry.

29. In effect, the Regulation established non-tax barriers against foreign beers.

30. This Regulation had an immediate, substantial and adverse impact on interstate and international commerce. In one year, 16 brands from

outside Puerto Rico completely abandoned the market.[1]

31. The Legislature continued with its protectionist zeal in favor of the local beer manufacturing industry, amending, in 1978, the law of taxes on alcoholic beverages to impose a special discriminatory differential to benefit those entities that produced less than 31 million gallons per year. See L.P.R.A. § 6912a of July 13, 1978. This tax was again increased in 1981 and 1989, but maintained the same level of discriminatory differential. From 1978 to the present, only one foreign manufacturer has qualified for the special exemption, and then only for an extremely limited period of time.

32. This last tax was questioned in court by the United States Brewers Association, an association composed of U.S. beer manufacturers, because it violated the principles of equal protection under the law and due process of law. See *United States Brewers Association, Inc. et al.* v. *Julio César Pérez, et. al.*, 109 D.P.R. 456 (1980); 455 F. Supp. 1159 (D.P.R. __); 592 F.2d. 1212 (1st Cir. 1979). Nonetheless, said case is not dispositive of the present case because there is no identity of parties or causes, nor are the same

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[1] In response to the filing of litigation in Federal Court in which the unconstitutionality of the discriminatory restrictions imposed by the Regulations was alleged under the Commerce Clause of the Constitution of the United States, the Treasury Secretary repealed them. Said action made the continuation of the pending litigation unnecessary.

remedies sought. In addition, neither the factual situation nor the evolution of the law justifies, as a matter of law, the same result.

33. Even though these legislative and administrative actions have represented an infusion of approximately 145 million dollars for the misnamed native beer industry (considering direct economic aid and tax exemptions), which today, in reality, is only one closely-held family corporation (with one distributor with more than enough economic resources, as is demonstrated in their acquisition of market share for Coca-Cola), the Legislature of Puerto Rico, yielding once again to an unjustified protectionist interest, has amended the excise tax law to create an even larger gap between the protected local industry and the beer manufacturers located outside Puerto Rico and their Puerto Rican distributors. The practical effect is that discrimination in excise taxes tripled.

THE EXCISE TAX SCHEME UNDER LAW NO. 69

34. On completion of its manufacture or upon arrival in Puerto Rico, domestic and imported beers are either transported to bonded warehouses, where the documents are prepared for the Treasury Department (Treasury) and payment of excise taxes is secured by bond, or the excise taxes are paid directly at the dock.

35. The corresponding excise taxes are paid by the Puerto Rican distributors to the Treasury Department at the moment when the distributor transfers the beer from the bonded warehouse to their own warehouse. Once the excise taxes are paid, the Puerto Rican distributors can freely transfer the product to their clients.

36. Law 69 increases the excise tax per gallon from $2.70 to $4.05.

37. Article 2 of said Law, nonetheless, provides for a graduated exception, which fixes the tax at $2.15 for production volumes that do not exceed 9 million gallons, the same excise tax level under the previous law for all producers whose total production did not exceed 31 million gallons, and slightly increases it somewhat as production reaches levels above 9 million gallons, 10 million gallons, 11 million gallons. Once 31 million gallons are achieved, the special exemption ceases to apply.

38. All plaintiffs are affected by the excise tax, as the special exemption is inapplicable to them.

39. Upon information and belief, only the local producer, India Brewery and its distributor for Medalla Light, its main product, will benefit from the special exemption, i.e. they are currently responsible only for the payment of a $2.15 tax, the same tax rate that applied to them under the previous legislation. This is so because the total production of the local brewery does not exceed 9 million gallons, nor has it exceeded it for years.

40. Law 69, in addition, requires that the new excise tax be paid on all beer inventory that had been in inventory as of June 14, 2002, irrespectively of whether excise taxes had already been paid for said inventory under the previous law. This is what is known as a "floor tax".

41. The "floor tax" consists of the difference of the previous and new excise tax, imposed on the beer inventories in the market, even if they are already in the hands of the businesses (markets, supermarkets, liquor stores, hotels, restaurants, bars, etc.)

Effect of the special exemption on plaintiffs

42. The measure in question produces, therefore, a double prejudicial effect on plaintiff beer importers: on the one hand, it immediately duplicates the gap contained in the discriminatory tax differential (from $2.15 per gallon to $2.70 per gallon before the current amendment, to $2.15 to $4.05 per gallon immediately and indefinitely until the local production exceeds 9 million gallons, if ever). On the other hand, as was alleged above, the measure provides that the new tax level will be applicable to all beer inventories found in warehouses belonging to the Puerto Rican distributors, or that have not been sold to the consuming public. In maintaining the same excise tax for local beer, without varying, therefore, the tax on beer that might still be in inventory or sold, whereas it is increased for all others, the latter will be the only ones that will have to pay taxes for

the unsold amounts, under the provision on the "floor tax".

43. Even though neither the measure nor its statement of purpose expresses, on its face, a discriminatory or protectionist intent, unconstitutional and statutorily proscribed, in their effect they undoubtedly have it.

44. In examining the legislative history and the statements presented before the Legislature, and legislative debates and other public manifestations of the legislators, it is clear that despite the initial reticence on the part of the Executive and the Legislature to perpetuate the discrimination created by the special exemption, neither the measure, nor the budget pending approval, would have garnered the necessary votes if the excessive preferential treatment for the sole benefit of the local brewery proposed by this measure had not been granted. See Statement of the Executive Vice-President of India Brewery of April 8, 2002; Statement of Mayaguez Mayor in support of the petitions of preferential treatment of the local brewery, among others.

First Cause of Action

Violation of the Commerce Clause of the United States Constitution

Interstate Commerce

45. All previous paragraphs are incorporated and re-alleged.

46. Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023, in its effects and application, creates a forbidden restriction on interstate commerce, as it promotes an irrational, restrictive, and unjust discrimination in favor of only one local producer and to the detriment of the free flow of commerce.

47. The total weight of the increase, though on the face of the Law appears to apply equally to entities from Puerto Rico and the United States, effectively falls completely on the Puerto Rican distributors that sell beer manufactured in the United States, with the forbidden purpose of making the importation, marketing, and sale of beers coming from the United States more difficult.

48. In addition, the discrimination does not promote the legitimate purpose of bringing in additional monies for the general fund of the C.P.R. On the contrary, it promotes DECREASED income, as the lower tax burden allows the local brewery to increase its market, maintaining prices at the same level at the expense of the Puerto Rican distributors of beers manufactured in the United States, and of the manufacturers they represent. With double the tax burden, they will see their sales decrease as they are forced by the double impact of the excise tax increase and the payment of the "floor tax". Furthermore, even if it were argued that the discrimination furthers a legitimate C.P.R. interest, such as the protection of the local production of beer, such practice is expressly prohibited by the Commerce Clause of the United States Constitution. Additionally, the

same interest can be furthered through non-discriminatory means. Also, the burden placed on interstate commerce by this discrimination, outweighs SUBSTANTIALLY the putative interest of local benefits. The constitutional interest of maintaining economic cohesion without the intervention of local limitations to interstate commerce is significantly affected. The LOCAL foreign beer distribution industry is also affected for the putative benefit of only one closely-held family company, which is what in reality the misnamed "local beer manufacturing industry" is about.

Second Cause of Action

Violation of the Commerce Clause of the United States Constitution

International Commerce

49. All previous paragraphs are incorporated and re-alleged.

50. Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023, in its effects and application, creates a forbidden restriction on international commerce, as it promotes an irrational, restrictive, and unjust discrimination in favor of only one local producer and to the detriment of the free flow of commerce.

51. The total weight of the increase, though on the face of the Law it appears to apply equally to entities from Puerto Rico and from outside of Puerto Rico, effectively falls completely on the Puerto Rican

distributors that sell beer manufactured outside Puerto Rico, with the forbidden purpose of making the importation, marketing, and sale of beers of foreign origin more difficult.

52. In addition, the discrimination does not promote the legitimate purpose of bringing in additional monies for the general fund of the C.P.R. On the contrary, it promotes LESS income, as the lower tax burden allows the local brewery to increase its market, maintaining prices at the same level at the expense of the Puerto Rican distributors of foreign-manufactured beer, and the manufacturers they represent. With double the tax burden, they will see their sales decrease as they are forced by the double impact of the excise tax increase and the payment of the "floor tax". Furthermore, even if it could be argued that the discrimination furthers a legitimate C.P.R. interest, such as the protection of the local production of beer, such a practice is expressly prohibited by the Commerce Clause of the United States Constitution. Additionally, the same interest can be furthered through non-discriminatory means. Also, the burden placed on international commerce by this discrimination, SUBSTANTIALLY outweighs the putative interest of local benefits. The constitutional interest of maintaining the free flow of commerce without the intervention of local limitations to international commerce is significantly affected. The LOCAL imported beer distribution industry is also affected for the putative benefit of only one closely-held family company, which is, in reality, what the

misnamed "local beer manufacturing industry" is about.

Third Cause of Action

Violation of Article 3 of the Federal Relations Act

53. Article 3 of the Federal Relations Act expressly prohibits tax discrimination between products produced locally and those of similar nature imported from the United States or foreign countries.

54. The Federal Relations Act is part of the constituent laws of the Commonwealth of Puerto Rico, and governs the special relationship between Puerto Rico and the United States.

55. Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023, in its application and effects, as was previously alleged, violates the clear and translucent provisions of Article 3 of the Federal Relations Act.

Appropriateness of Injunctive Relief

56. All previous paragraphs are incorporated and re-alleged.

57. The A.P.I.C. member-corporations are local merchants, established in Puerto Rico for decades. Méndez began operations in 1912; Ballester in 1914; B. Fernández in 1888; and V. Suárez in 1940.

58. Between them, and only for fiscal year 2001, they contributed $19,271,761.00 to the public treasury

of Puerto Rico. They paid, in taxes on personal and real-estate property, $4,814,684.28. Their municipal license taxes amounted to $4,148,380.59. They paid $135,306,346 in excise taxes for beer; they generated direct jobs amounting to 1,176, representing a payroll of $25,662,674 and thousands of indirect jobs.

59. In just the last year, these Puerto Rican enterprises have made contributions to the development of Puerto Rico in philanthropic, cultural, sporting, and artistic activities in the amount of $7,896,977. All of this has been achieved by their own efforts, with the dedication and zeal of its labor force in Puerto Rico without any government aid whatsoever.

60. In contrast, the local brewery, according to its statement before the Legislature dated April 8, 2002, paid, for the same period, $104,376 in property taxes; $333,228 in excise taxes on beer; $10,429 503 in income taxes, and generated only 250 direct jobs representing a payroll of $13,006,000.

61. If this Honorable Court does not immediately stop, pending final resolution of this action, the discriminatory treatment imposed by Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023, to allow all manufacturers and distributors of beer to be subject to and pay the same excise tax level, the plaintiffs will be caused irreparable damage, non-compensable with money, to wit:

a. The violation of a constitutional right constitutes, *per se*, an irreparable damage.

b. Plaintiffs would lose their investments and market position, achieved through years of incessant work to position their brands. The double tax burden, along with the payment of the "floor tax", will irrevocably cause a hike in prices of imported beers, while the local beer producer publicly announces that it will not raise its prices, as it has announced, obviously because they are not affected whatsoever by the new law. This will bring, as an inevitable consequence, the loss of market position that the local distributors have achieved through years of effort and with no subsidy from the government. The loss of market is not compensable with money, is extremely hard to recover, and, certainly, once lost cannot be recovered in a short or medium term. As of today, 12 years after the last excise tax increase, Puerto Rican beer distributors have not been able to recover the market levels they enjoyed before the increase was imposed.

c. Plaintiffs have a great probability of prevailing on the merits, given the gross violation of constitutional and statutory rights, including violations of the constituent laws of the Commonwealth of Puerto Rico effected by Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023.

d. The public interest, far from being damaged, will be benefited given that:

(i) The validation of constitutional rights, which are fundamental pillars of our democratic system of government, always serves the highest public interest.

(ii) As a consequence of the elimination of the discrimination created by the Article and Section challenged herein, the treasury will be benefited with additional income.

(iii) The right of selection of beers enjoyed by the consumers in Puerto Rico will not be affected.

(iv) The remedy requested promotes free competition, commercial stability, and the best interests of Puerto Rico and the American Nation with whom Puerto Rico has established the existent juridical nexus.

62. The balance of interests will not be adversely affected. The stability of a very important economic sector for the economic development of Puerto Rico will be preserved; enough income will be collected to cover the deficit of the past five years, when the recurring income has been lower than the recurring expenses; the balancing of the budget for the coming fiscal year will be helped, and the state always has at its disposal non-discriminatory means to protect the interests of the private corporation that produces beer in Puerto Rico, without affecting the remainder of the beer distribution industry, also from Puerto Rico, and the contributions of the same to the economic, social, cultural, and artistic development of Puerto Rico.

REQUEST FOR REMEDIES

63. In keeping with the allegations above, it is respectfully requested that this Honorable Court:

a. Declare Article 2 of Law 69 of May 30, 2002, 13 L.P.R.A. § 4023 unconstitutional and illegal under the Commerce Clause of the Constitution of the United States and Article 3 of the Federal Relations Act of Puerto Rico.

b. Immediately Order the Treasury Secretary to charge the tax rate contained in Article 1 of Law 69 of May 30, 2002 to all contributors, without exception or preferential treatment whatsoever.

c. Provide any other remedy that proceeds under law.

WHEREFORE, it is respectfully requested that this Honorable Court, after conducting the applicable legal proceedings, and in the most expedited manner possible, given the grave and irreparable consequences that its postponement or dilation entail for the plaintiffs and the public interest, grant the remedies requested above.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on June 13, 2002.

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OATHS

I affirm and swear that I have read the petition above and that the facts alleged in the same are true according to my personal knowledge or based on the business records of the entity I represent.

Luis A. Alvarez
President of APIC and
Vice-President of
Méndez & Co.

Alfonso F. Ballester
President of
Ballester Brothers, Inc.

Diego A. Suárez Chairman of the Board V. Suárez & Co.	José A. Méndez President of B. Fernández & Brothers
Virgilio Pérez Pascoe Vice-President for Latin America of Coors Brewing Company	Boudewijn N. Haarsma Authorized Officer of Heineken Brouwerijen N.V.

Affidavit 29

Sworn and signed by Luis A. Alvarez, of legal age, single, President of APIC and Méndez & Co., and resident of Guaynabo, Puerto Rico, who I have identified by his driver's licence no. 1205052, issued by the Commonwealth of Puerto Rico, in San Juan, Puerto Rico, on this 13th day of June, 2002.

Notary Public

Affidavit 30

Sworn and undersigned by Diego A. Suárez, of legal age, married, Chairman of the Board of V. Suárez & Co., and resident of San Juan, Puerto Rico, who I have identified by his driver's licence no. 92816, issued by the Commonwealth of Puerto Rico, in San Juan, Puerto Rico, on this 13th day of June, 2002.

Notary Public

Affidavit 31

Sworn and undersigned by José A. Méndez, of legal age, married, President of B. Fernández & Brothers, Inc., and neighbor of San Juan, Puerto Rico, who I have identified by his driver's licence no. 275088, issued by the Commonwealth of Puerto Rico, in San Juan, Puerto Rico, on this 13th day of June, 2002.

_____

Notary Public

Affidavit 32

Sworn and undersigned by Alfonso F. Ballester González, of legal age, married, President of Ballester Brothers, Inc., and neighbor of San Juan, Puerto Rico, who I have identified by his driver's licence no. 87048, issued by the Commonwealth of Puerto Rico, in San Juan, Puerto Rico, on this 13th day of June, 2002.

_____

Notary Public

Affidavit 33

Sworn and undersigned by Virgilio Pérez Pascoe, of legal age, married, Vice-President For Latin America of Coors Brewing Company, and neighbor of Golden, Colorado, who I have identified by his driver's licence no. 97-273-6574, issued by the State of Colorado, in San Juan, Puerto Rico, on this 13th day of June, 2002.

_____

Notary Public

_____

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR (COURT) SAN JUAN SECTION

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS; Coors Brewing Company; and Heineken Brouwerijen N.V. Plaintiffs, vs. Commonwealth of Puerto Rico, represented by Anabelle Rodríguez in her official capacity as Attorney General; José A. Flores Galarza, in his official capacity as Treasury Secretary; India Brewery; and CC1 Beer Distributors. Defendant.	Case No. KPE 2002-1282 Re: Extraordinary Remedies; Declaratory Sentence and Request for Preliminary and Permanent Injunction

Sworn Statement of Boudewijn N. Haarsma

I, Boudewijn N. Haarsma, declare under oath that, being duly authorized by Heineken Brouwerijen B.V, I have read the antecedent Sworn Petition and affirm that the facts alleged in it are true according to my personal knowledge or to the business records of the entity I represent.

And to record it as such, I swear and subscribe this declaration in the city of Philadelphia, in the State of Pennsylvania on June 13, 2002

_____

Bodewijn N. Haarsma

The State of Pennsylvania
City of Philadelphia

Sworn and executed before me by Boudewijn N. Haarsma, whose identity I have verified by means of his driver's license, in Philadelphia, Pennsylvania, this 13th day of June, 2002.

_____

Notary Public

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF THE TREASURY
SAN JUAN, PUERTO RICO

REGULATION

TO ESTABLISH THE STANDARDS TO BE FOLLOWED IN THE LABELING OF ALCOHOLIC BEVERAGE CONTAINERS, TO SPECIFY THEIR CAPACITY AND TO PROHIBIT ON THE LABELS OF ANY BEVERAGE NOT PRODUCED IN PUERTO RICO THE USE OF ANY WORD THAT MAY IMPLY THAT SAID BEVERAGE WAS MADE IN PUERTO RICO

ARTICLE 1. – LEGAL BASIS

This Regulation is promulgated under the provisions of Articles 88 and 98 of Act No. 143 of June 30, 1969, as amended, known as the "Alcoholic Beverage Act of Puerto Rico", to implement the provisions of Articles 51, 57 and 92 of such Act.

ARTICLE 2. – ABBREVIATED TITLE

This Regulation shall be known as the Container Regulation.

ARTICLE 3. – DEFINITIONS

For purposes of this Regulation, the following terms shall have the meaning expressed herewith, unless some other meaning is clearly indicated by the context:

A. Label – The label shall be understood to mean the combination of words or phrases that describe the contents of a container, whether or not this information is printed or painted on paper, lithographed or engraved on the top or the main body of the container, or any combination thereof.

B. Liter – The metric unit of volume equivalent to 1,000 cubic centimeters measured at a temperature of 4°c, when referring to wines, and at a temperature of 15.56°c, when referring to distilled spirits. For purposes of this Regulation, a liter of wine is equivalent to 0.26417 wine gallons and a liter of distilled spirits to 0.264172 wine gallons.

C. The remaining terms used in this Regulation shall have the same meaning as that provided in Article No. 5 of Act No. 143 of June 30, 1969, as amended, known as the "Alcoholic Beverage Act of Puerto Rico".

ARTICLE 4. – CONTAINER SIZES

From the effective data of this Regulation, distilled spirits and alcoholic beverages may not be sold in Puerto Rico to rectifiers, producers and bottlers in containers of less that one gallon. Rectifiers, bottlers and wholesale dealers may sell in Puerto Rico their products to retail dealers in containers of the sizes listed below.

A. Rectifiers, bottlers and wholesale dealers may sell rectified spirits to retail dealers in containers of the following sizes:

1.75 liters	375 milliliters
1.00 liter	200 milliliters
750 milliliters	100 milliliters
500 milliliters	50 milliliters

B. Wine producers, bottlers and wholesale dealers may sell wine to retail dealers in the following sizes:

(1) Containers of up to three (3) liters:

3 liters	375 milliliters
1.5 liters	187 milliliters
1.0 liter	100 milliliters
750 milliliters	

(2) Containers of more than three (3) liters:

Wine may be bottled in containers of four liters or more provided that the label clearly indicates the contents of the container in complete liters.

Example: 4 liters, 5 liters, 6 liters, etc.

(3) The container sizes mentioned above do not apply to the oriental beverage known by the name of "Saki".

C. Wholesale producers, importers and wholesale distributors and dealers of any malt product, fermented or non fermented, or beer, may only sell their products to retail dealers in containers of the following sizes:

(1) 1 barrel

(2) ½ barrel

(3) ¼ barrel

(4) 7 ounces in "lettered round" bottles

(5) 12 ounces in "plain round" bottles

(6) 10 ounces in cans

D. The 7 and 12 ounce bottles, authorized in paragraph C above, shall be amber in color and shall be of the size, shape, and characteristics established in the specifications forming part of this Regulation; they shall have no marks, emblems or embossments of any kind, except those established by such specifications. The 10 ounce cans, also authorized by paragraph C, shall meet the requirements and have the characteristics described in the specifications also forming part of this Regulation.

ARTICLE 5. – LABELS

There shall be adhered or affixed to every container of distilled spirits or alcoholic beverages a label on which there shall be painted, engraved, lithographed or printed, in easily readable letters, the following information:

A. The exact contents of the container.

B. The alcoholic content, by volume, of the beverage, expressed in proof or percentage of alcohol.

C. The commercial name or trademark by which it is known in the market.

D. When the container is used for rum, the label shall prominently display, in English, the phrase "Puerto Rican Rum" or, in Spanish, Ron de Puerto Rico" in letters of a size as stated herein. In the case of bottles, these letters shall have a height of not less than 7.95 mms with lines not less than 1.59 mms. The phrase should have a horizontal measurement of not less than 76.2 mms. For bottles of 200 milliliters or less, the phrase "Puerto Rican Rum" or "Rum of Puerto Rico" or "Ron de Puerto Rico", must appear on the label in letters with a height of not less than 3.18 mms, and with a horizontal measurement of not less than 33.1 mms. The phrase "Puerto Rican Rum", "Rum of Puerto Rico", or "Ron de Puerto Rico", as the case may be, shall have a color which contrasts with the color of the rum and the color of the label. The commercial name or trademark by which the rum is known must be prominently displayed on the label in letters at least three times as large as those used to indicate the name of the producer, distiller, rectifier, or bottler. This provision is applicable only and exclusively to rums distilled in Puerto Rico, whether or not they are subsequently rectified and bottled in Puerto Rico.

E. The name of the corporation, partnership, or other owner of the distillery in which the rum is distilled.

F. The location of the distiller or producer of the rum, whenever the rectifier and distiller are the same.

G. In the event that the distilled spirits or alcoholic beverages are not distilled or produced, but are simply bottled by a particular entity, the name of the bottler must appear on the label after the phrases "Bottled by".

H. The words "Distilled", "Rectified", "Mixed", "Prepared", or "Bottled", as the case may be, must always appear on the label.

(1) The word "Distilled" will be used on the label to identify those distilled spirits which have not been rectified in any way.

(2) If the distiller is also the rectifier, the term "Produced by" should appear on the label of the product.

(3) If the entity is only a rectifier, the term "Prepared by" must appear on its label.

(4) If the entity is a bottler, the term "Bottled by" must appear on its label.

The preceding wording may appear on the label either in English or in Spanish.

ARTICLE 6. – LABEL APPROVAL

A. No person shall bottle, import, or otherwise introduce alcoholic beverages into Puerto Rico without having obtained a "Certificate of Label Approval". In order to obtain such a certificate, the interested person must file an application in triplicate with the information required by the Secretary, including therewith three (3) copies of each label for which approval is requested. Any such label may not be used until it has been duly approved. The original of the application for label approval will be returned to the applicant. There shall be firmly affixed to the original as well as the copies one of each of the labels that will appear on the bottle. Any certificate of Label Approval, issued in compliance with those conditions, shall be subject to inspection by any official of the Bureau of Alcoholic Beverage Taxation. Importers of alcoholic beverages, except beer, shall identify the alcoholic beverages so imported with an additional label on which appears the name and address of the importer. This information may appear on the principal label on the bottle, if the importer so desires.

B. Distillers, rectifiers, or bottlers of rum in Puerto Rico who ship Puerto Rican rum to exterior markets shall not use nor shall they permit the use on the containers of such rum any label which has not been duly approved by the Secretary of the Treasury.

Shipments of Puerto Rican rum in containers of less than one gallon shall have firmly affixed to each container the labels approved by the Secretary.

ARTICLE 7. – USE OF THE PHRASE "PUERTO RICAN RUM", "RUM OF PUERTO RICO", OR "RON DE PUERTO RICO" PROHIBITED ON RUMS NOT PRODUCED IN PUERTO RICO

Distillers, rectifiers, or bottles of rum or other alcoholic beverages in Puerto Rico shall not use nor shall permit the use of by any natural or juridical person or entity with which they may have some relation, be it the mother company to which they are subject or a subsidiary or affiliate, the phrase "Puerto Rican Rum", "Rum of Puerto Rico", "Ron de Puerto Rico", or any part of such phrase or combination thereof on labels of rum or other alcoholic beverages which have not been produced in Puerto Rico, nor shall they permit the use by such persons or entities of words or phrases on the labels of any beverage not produced in Puerto Rico which may imply that the beverage was produced in Puerto Rico.

The violations of the provision shall constitute sufficient cause for the revocation of the permit granted by the Secretary of the Treasury to carry out the previously mentioned activities, upon due notification and the celebration of hearings, as provided by Article 93 of the Law.

ARTICLE 8. – TRADEMARKS, DATES, LABEL DESIGNS.

No label shall contain information, trademark, commercial names, designs, or dates that may confuse

the buyer or the general public. Every date referring to the establishment of some business and which appears on the distilled or rectified spirits label or of any other alcoholic beverage produced in Puerto Rico shall be used exclusively with reference to the business established in conformity with the "Alcoholic Beverage Act of Puerto Rico."

ARTICLE 9. – RUM AGE APPEARING ON LABELS

The age of any rum can only be shown on the label if such rum is distilled, aged, rectified and bottled under strict governmental control. No government official may certify the age of Puerto Rican rum unless the Internal Revenue Agent who made the determination of alcoholic content certifies in his report the length of time it has been in a bonded warehouse under government control.

ARTICLE 10. – TROPICAL FRUIT WINE LABELS

No label of any tropical fruit wine may show a drawing or painting of any fruit other than the tropical fruit or fruits from which such wine is made.

ARTICLE 11. – IMITATION WINE LABELS

Any wine containing synthetic substances or additives not normally used by the wine industry, with the purpose of artificially enhancing the flavor, aroma, color, or other characteristics shall be designated as an imitation wine, which designation shall

be prominently displayed on the label in letters not less than 3.18 cm in height.

ARTICLE 12. – LABELING OF BEER AND MALT PRODUCTS

All malted beverages, whether fermented or not, and beer which is imported or introduced into or produced in Puerto Rico shall be labeled with the inscription "Puerto Rico" in capital letters of no less than eight (8) points, that is, with a height of no less than 1.59 cm and with the trademark or particular name of the producer. Such inscription shall be lithographed on the bottle cap and on the cilindrical body of the can.

ARTICLE 13. – LABEL APPROVAL FOR BEER AND MALT PRODUCT LABELS

Every person who produces, imports, or otherwise introduces beer and other malt products fermented or non fermented for the sale and consumption in Puerto Rico must have the prior approval of the containers, labels and bottle caps, for which purpose he shall submit, for the approval of the Secretary, three samples of the containers, three samples of the labels and three samples of the bottle caps before being authorized for use in Puerto Rico. The Secretary will authorize their use, if in his judgment the containers, the labels and the caps meet the stated requirements.

ARTICLE 14. – PENALTIES

Every importer, introducer or wholesale or retail dealer who may have in his possession distilled spirits, alcoholic beverages, any malt product, whether fermented or not, or beer, whose containers, labels, and bottle caps do not meet the specifications established in this Regulation shall be charged with a misdemeanor and, if found guilty, shall be sentenced to the payment of a fine of not less than one hundred (100) dollars nor more than five hundred (500) dollars or imprisonment for a term of not less than thirty (30) days or more than six (6) months.

ARTICLE 15. – SEPARABILITY CLAUSES

Should any word, clause, paragraph, article, or part of this Regulation be declared null and void by a Court of competent jurisdiction, the decree issued thereby shall not affect nor invalidate the rest of this Regulation, but rather its effect shall be limited to the word, clause, paragraph, article, or part which is so declared.

ARTICLE 16. – REPEALING CLAUSE

The Regulation "To Establish the Standards to be Followed in the Labeling of Alcoholic Beverage Containers, to Specify their Capacity, and to Prohibit on the Labels of Any Beverage not Produced in Puerto Rico the Use of any Word that may imply the said Beverage was made in Puerto Rico", approved December 30, 1974, as well an any other provision, rule,

or regulation which conflicts with this Regulation, is hereby repealed.

ARTICLE 17. – EFFECTIVITY

This Regulation shall become effective thirty (30) days after being filed in the Department of State of Puerto Rico, in conformity with the provisions of the Regulations Act of 1968, as amended.

San Juan, Puerto Rico, July 19, 1984.

/s/ Carmen A. Culpeper
Carmen Ana Culpeper
Secretary of the Treasury

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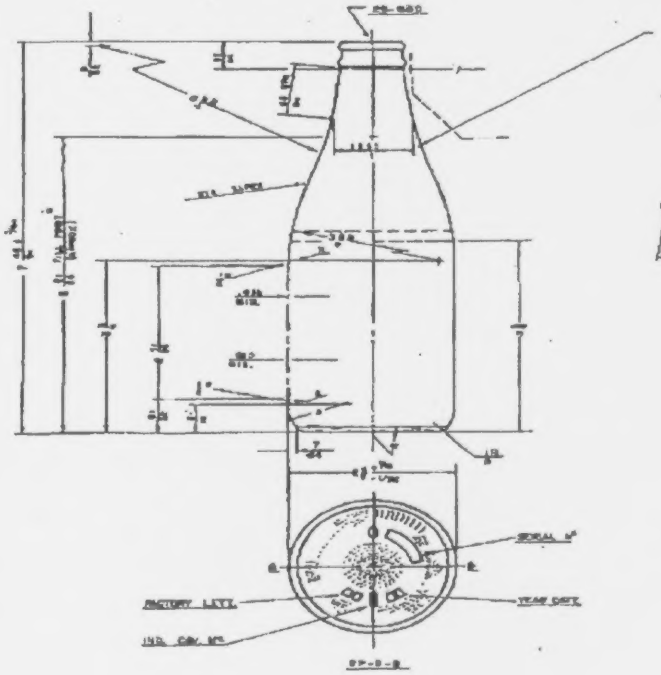
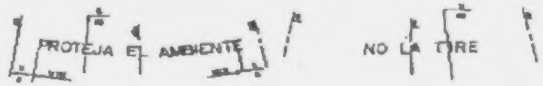
12 Onzas



·"Proteja el Ambiente" and "No la Tire" Shown Dev. to Appear in Str Line on Opposite Sides of Shoulder And to be Round BTM Style Raised .012 Max. in Glass.



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SUPREME COURT, U.S.

No. 07-748

In The Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS, et al.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. The Puerto Rico Courts did not decide that the dormant commerce clause does not apply to Puerto Rico	7
A. The Supreme Court of Puerto Rico did not decide that the dormant commerce clause does not apply to Puerto Rico	7
B. The Court of Appeals did not hold that the dormant commerce clause does not apply to Puerto Rico	9
C. The trial court did not hold that the dormant commerce clause does not apply to Puerto Rico	9
D. The Puerto Rico courts scrutinized Act No. 69 and held that it did not violate the anti-discrimination prohibitions of the Federal Relations Act	10
II. Petitioners are requesting that this Court issue an advisory opinion	10
III. Petitioners have had several opportunities, in both federal and Puerto Rico courts, to present their statutory and Constitutional challenges to the statute	12
CONCLUSION	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Coors Brewing Co. v. Calderón, 225 F. Supp. 2d 22 (D.D.C. 2002) 13

Coors Brewing Co. v. Secretary of the Treasury, Civil No. 06-2150 (DRD), Opinion and Order of September 30, 2007 (D.P.R. 2007) 14

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 11

Massachusetts v. Environmental Protection Agency, ___ U.S. ___, 127 S.Ct. 1438 (2007) 11

U.S. Brewers Ass'n, Inc. v. Pérez, 592 F.2d 1212 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979) 12, 13

PUERTO RICO CASES

Banco Popular de Puerto Rico v. Municipio de Mayagüez, 126 D.P.R. 653 (1998) 5

Ex Parte Alexis Delgado Hernández, 2005 T.S.P.R. 95 at 10-11 7

Figueroa Méndez v. Superior Court, 101 D.P.R. 859 (1974) 7

RCA v. Gobierno de la Capital, 91 D.P.R. 416 (1964) 5, 6

Rivera Maldonado v. Commonwealth of Puerto Rico, 119 D.P.R. 74 (1987) 7

U.S. Brewers Ass'n, Inc. v. Secretary of the Treasury, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980) 2, 4, 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL LAWS

28 U.S.C. § 2201 14

48 U.S.C. § 1983 14

Federal Relations Act ..... *passim*

Interstate Commerce Clause of the Constitution of the United States 2

PUERTO RICO LAWS

Art. III, § 2 of the Constitution 10

Public Law 69 ..... *passim*

Puerto Rico Acts

Act No. 69 of May 30, 2002 ..... *passim*

Act No. 37 of July 13, 1978 ..... 2, 12

PUERTO RICO RULES

Rule 44 of the Rules of the Supreme Court of Puerto Rico 4 L.P.R.A. App. XXI-A R. 44 7

TREATISES

Erwin Chemerinsky, *Federal Jurisdiction* § 2.2 at 51 (4th ed. 2003) 11

INTRODUCTION

Contrary to petitioners' claims, this case does not present a conflict between the federal courts and the Supreme Court of Puerto Rico, or even an instance where the Supreme Court of Puerto Rico has contravened or ignored precedents established by this Court or lower federal courts. Petitioners have isolated a portion of a concurring opinion by an associate justice of the Puerto Rico Supreme Court in order to give the impression that this case presents an issue worthy of *certiorari* review. However, in reaching its decision in this case, the courts below assumed that the dormant commerce clause of the United States Constitution applies to Puerto Rico and considered the relevant constitutional and statutory norms, even if the result of that analysis did not meet petitioners' expectations.

Further, petitioners and their privies have had several opportunities to present their constitutional arguments, which have been thoughtfully considered by Commonwealth and federal courts. The fact that those courts have not granted the remedies sought by petitioners does not transform this case into one worthy of the issuance of a writ of certiorari by this Court.

STATEMENT OF THE CASE

This case began as a challenge to Puerto Rico Act No. 69 of May 30, 2002, which amended certain provisions of the Puerto Rico small brewer exemption;

first enacted through Act No. 37 of July 13, 1978. Substantially similar provisions are currently found in a number of states and the Federal Government itself.[1] The constitutionality of the small brewer exemption, first enacted through Act No. 37, was originally challenged in 1978. The Puerto Rico Supreme Court upheld the Act's constitutionality two years later. *U.S. Brewers Ass'n, Inc. v. Secretary of the Treasury*, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980).

Twenty-seven years later, the Supreme Court of Puerto Rico entered judgment, again upholding the constitutionality of the current version of Puerto Rico's small brewer exemption. Two of the six Justices issued concurring opinions. Pet. App. 3. One of these, Associate Justice Fuster, sadly now deceased, wrote that although mere application of the *U.S. Brewers* precedent sufficed to resolve the issue before the Court, he personally "wish[ed] to deal . . . with the thorny subject of whether the limitations arising from the Interstate Commerce Clause of the Constitution of the United States apply to Puerto Rico *ex proprio vigore*." Pet. App. 4-5. He then proceeded to explain at length his own view that Congress has not clearly intended to subject Puerto Rico to those limitations. Pet. App. 4-20.

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[1] *See, e.g.*, MCA 16-1-406 (Montana); M.C.L.A. 436.1409 (Michigan); McKinney's Tax Law § 424 (NY); M.S.A. § 297G.04 (Minnesota); R.C. § 4303.332 (Ohio); W.S.A. 139.02 (Wisconsin); West's RCWA 66.24.290 (Washington); 72 P.S. § 9010 (Pennsylvania); 26 U.S.C. § 5051 (U.S.).

The other concurring Justice, Mr. Rebollo, wrote at even greater length to say, among other things, that while the Federal Relations Act ("FRA") forbids discrimination between articles imported from the United States and foreign countries and similar articles produced in Puerto Rico, and although the dormant commerce clause of the U.S. Constitution *does* apply to Puerto Rico, the small brewer exemption as amended is not discriminatory and contravenes neither the FRA nor the dormant commerce clause. Pet. App. 20-60. Neither of these concurring opinions are the opinion of the court. What the Court as a whole actually did was to affirm the judgment of the court below, the Puerto Rico Court of Appeals, although without explaining its reasons.

The judgment of the Puerto Rico Court of Appeals did explain *that* court's reasoning in detail. Pet. App. 61-97. Specifically, the Court of Appeals discussed and applied both the dormant commerce clause and the Federal Relations Act. With respect to petitioners' challenge under the dormant commerce clause, the Court of Appeals undertook what it termed "an in-depth analysis of this point." Pet. App. 88. After discussing at length this Court's relevant dormant commerce case law, the Court of Appeals held that, as amended, Puerto Rico's small brewer exemption was

not discriminatory in its face, nor did it have a discriminatory purpose or effect.[2] *See*, Pet. App. 88-96.

With respect to petitioners' challenge based on the FRA, the Court of Appeals noted that the same argument had been addressed by the Puerto Rico Supreme Court in its 1980 *U.S. Brewers* decision with respect to the small brewer exemption as originally enacted. After quoting extensively from the Puerto Rico Supreme Court's reasoning in *U.S. Brewers*, the Court of Appeals observed that the very same arguments applied in this case and therefore compelled the same result. *See* Pet. App. 82-86. The Court of Appeals therefore affirmed the judgment of the trial court, the Court of First Instance, Superior Court of San Juan, which had upheld the constitutionality of the small brewer exemption, as amended.

The trial court had dismissed petitioners' complaint only after considering their arguments based on the FRA and the dormant commerce clause on the merits. In this respect, it should be noted that petitioners' suggestion that the trial court rejected their dormant commerce claims on grounds that *stare decisis* bound it to ignore the applicability of the dormant commerce clause is both misleading and out of context. *See*, Pet. 13 and 23-24 (quoting Pet. App. 111). It is misleading because, although petitioners

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[2] Petitioners admit that the small brewer exemption is not discriminatory on its face. *See*, Pet. 10 ("As written, Law No. 69 appears to be non-discriminatory.").

allegedly quoted literally from the opinion of the Court of First Instance, *see* Pet. at 13, they did so in an incomplete fashion, so as to give the erroneous impression that the Court of First Instance simply followed the Puerto Rico Supreme Court's previous ruling that the dormant commerce clause is inapplicable to Puerto Rico. *See*, Pet. App. at 111. It is out of context because it is clear from the very language of the trial court immediately following the portion "quoted" by petitioners, that the lower court did in fact consider petitioners' dormant commerce clause arguments at length, and rejected them on the merits, in light of this Court's applicable dormant commerce case law. *See*, Pet. App. 111-125.[3]

The trial court similarly rejected petitioners' challenge based on the FRA, holding that there was no meaningful difference between the small brewer exemption as amended, subject of the challenge here, and the small brewer exemption as originally

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[3] The Court of First Instance expressly called into question the continuing validity of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964) – upon which petitioners premise their claim of a "conflict" between P.R. Supreme Court and federal courts' views of the applicability of the dormant commerce clause to Puerto Rico – in light of subsequent Puerto Rico Supreme Court decisions entertaining the merits of challenges based on dormant commerce grounds. Pet. App. 111-112 (citing *Banco Popular de Puerto Rico v. Municipio de Mayagüez*, 126 D.P.R. 653, 658 (1998)). In fact, the Court of First Instance specifically noted that, given these subsequent Puerto Rico Supreme Court cases, it felt compelled to consider the merits of petitioners' dormant commerce clause claims. *Id.*

enacted, whose validity had been upheld by the Puerto Rico Supreme Court in *U.S. Brewers* after due consideration of both the FRA and the dormant commerce clause. Consequently, the court determined that the Puerto Rico Supreme Court's reasoning in *U.S. Brewers* compelled the same result here, and upheld the statute's validity against petitioners' challenge. Pet. App. 105-111.

REASONS FOR DENYING THE PETITION

Petitioners argue that there is a conflict over whether the dormant commerce clause applies to Puerto Rico. If there be such a conflict, this case certainly does not present any such conflict. Here, as noted above, the Commonwealth lower courts *did* analyze petitioners' dormant commerce claims on their merits, and their judgments went on to be affirmed by the Supreme Court of Puerto Rico. The Commonwealth courts also considered the merits of petitioners' arguments based on the antidiscrimination provisions of the Federal Relations Act, and although the result of the courts' analysis predictably did not satisfy petitioners – who have unsuccessfully challenged and are still challenging the statute in question and its predecessor statutes in federal and commonwealth courts – the fact that those courts to date have simply not ruled as petitioners would have wished does not create a conflict with decisions of this Court nor does it imply that petitioners have been without an adequate forum to present their

arguments in this regard. This Court should deny the petition.

I. The Puerto Rico Courts did not decide that the dormant commerce clause does not apply to Puerto Rico.

In a specious attempt to get this Court to grant discretionary review, Petitioners boldly misconstrue the record below erroneously alleging, among other things, that the Puerto Rico Courts held that Act 69 does not contravene the dormant commerce clause because said clause is inapplicable to Puerto Rico. Contrary to Petitioners' claims, however, the Puerto Rico Court's did not reach such a conclusion. Indeed, those Courts expressly assumed that the dormant commerce clause applies to Puerto Rico, yet concluded that Act 69 does not discriminate against interstate or international commerce.

A. The Supreme Court of Puerto Rico did not decide that the dormant commerce clause does not apply to Puerto Rico.

A judgment issued without opinion by the Supreme Court of Puerto Rico does not establish a rule, nor does it reverse an existing rule. *Ex Parte Alexis Delgado Hernández*, 2005 T.S.P.R. 95 at 10-11; *Rivera Maldonado v. Commonwealth of Puerto Rico*, 119 D.P.R. 74 (1987). *See also Figueroa Méndez v. Superior Court* 101 D.P.R. 859, 862-863 (1974); Rule 44 of

the Rules of the Supreme Court of Puerto Rico 4 L.P.R.A. App. XXI-A R. 44.

The judgment of the Supreme Court of Puerto Rico in this case, issued without opinion, does not establish a precedent. In addition, a concurring opinion of one of the associate justices, *a fortiori*, does not represent the position of the court. Here, in a judgment that did not have precedential effect, two of the six justices did not participate and the remaining four voted to affirm.

One of the two who did not participate disqualified herself because, before being appointed to the Supreme Court, she had been a member of the Court of Appeals panel that issued the unanimous judgment under review. Of the four justices who did vote, all of whom voted to affirm the decision of the Court of Appeals, one wrote separately to discuss his qualms about the applicability of the dormant commerce clause to Puerto Rico. Another wrote to the contrary, to reiterate his opinion that the clause did apply to Puerto Rico. The other two voted simply to affirm. If one were to speculate about the views of these two justices, as well as the views of the justice who disqualified herself, one would have to look to the decision of the Court of Appeals.

B. The Court of Appeals did not hold that the dormant commerce clause does not apply to Puerto Rico.

The opinion of the Court of Appeals expressly assumed that the dormant commerce clause applies to Puerto Rico. The discussion at Pet. App. 86-96 is unambiguous. In particular, the Court of Appeals discussed at length this Court's case law regarding the dormant commerce clause of the U.S. Constitution and after a thorough analysis concluded that Act No. 69 does not contravene the dormant commerce clause because it not discriminatory on its face, in its intent or in its effect.

One of the judges who joined in the opinion, Ms. Fiol Matta, App. 62, was later appointed to the Supreme Court. Although for obvious reasons she disqualified herself when the case came to be considered by the Supreme Court, she had joined the decision of the Court of Appeals which clearly applied dormant commerce clause analysis to the issues under review.

C. The trial court did not hold that the dormant commerce clause does not apply to Puerto Rico.

As noted above, in reaching its decision, the Puerto Rico Court of First Instance assumed that the dormant commerce clause applies to the Puerto Rico Act. Pet. App. 111-112. Indeed, said Court specifically decided that Puerto Rico Supreme Court precedent compelled it to consider the merits of

Petitioners' dormant commerce clause claim. *Id.* Hence, the Court of First Instance undertook an analysis of the challenged Public Law 69 in light of the anti-discriminatory limitations placed on the States by the dormant commerce clause and explicitly held that it "does not have the purpose or effect of discriminating against interstate or international commerce." Pet. App. 125.

D. The Puerto Rico courts scrutinized Act No. 69 and held that it did not violate the anti-discrimination prohibitions of the Federal Relations Act.

The trial court, the Court of Appeals, and – at least by implication – the Supreme Court of Puerto Rico, all held that Act No. 69 was not improperly discriminatory on its face, in its intent, or in its effect. The Court of Appeals and the Court of First Instance both expressly undertook an analysis of the statute in light of the restrictions imposed by the dormant commerce clause, and concluded that the statute was not discriminatory. Both courts also analyzed the statute in light of the antidiscrimination provisions of the Federal Relations Act, and reached the same conclusions.

II. Petitioners are requesting that this Court issue an advisory opinion.

Art. III, § 2 of the Constitution "limits federal-court jurisdiction to 'Cases' and 'Controversies.'"

Massachusetts v. Environmental Protection Agency, ___ U.S. ___, 127 S.Ct. 1438, 1452 (2007). Among other things, this judicial limitation prohibits federal courts from issuing advisory opinions. *Id.*; *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). An opinion is not an advisory opinion and therefore justiciable, when there is "substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect". Erwin Chemerinsky, *Federal Jurisdiction* § 2.2 at 51 (4th ed. 2003). Clearly, the opinion sought by Plaintiff in this case would be an advisory opinion, since a declaration that the dormant commerce clause applies to Puerto Rico will have no effect on the validity of Act 69.

Petitioners' goal is to get this Court to issue an opinion concluding that the dormant commerce clause applies to Puerto Rico. Nevertheless, such an opinion would have no effect on this case because, as noted above, the courts of Puerto Rico assumed that the dormant commerce clause applies to Puerto Rico, examined the merits of Petitioners' dormant commerce clause claims and, after a thorough analysis of this Court's relevant case law, concluded that Law 69 does not contravene the dormant commerce clause because it did not discriminate against interstate or international commerce on its face, in its purpose, or in its effect. Therefore, an opinion concluding that the dormant commerce clause applies to Puerto Rico will not change the results reached by the Puerto Rico courts and, more importantly, will not invalidate Act 69 or bring about any change in the manner in which

it is interpreted or applied. Such an opinion from this Court would clearly be advisory and, therefore, outside of the jurisdiction of this Court.

III. Petitioners have had several opportunities, in both federal and Puerto Rico courts, to present their statutory and Constitutional challenges to the statute.

Contrary to their claims that they lack a forum, the petitioners and their privies have had numerous turns at bat, over the last thirty years, in both local and federal courts.

Their first attempt before the Commonwealth courts resulted in the 1980 decision of the Supreme Court of Puerto Rico in *U.S. Brewers*, 9 P.R. Offic. Trans. 605.[4] Plaintiffs there included, among others, Anheuser Busch, Inc. and Miller Brewing Company. Pet. App. 147. They challenged Act No. 37 of July 13, 1978, which established a differential in the excise tax imposed on beer produced by small brewers as opposed to larger ones. Pet. App. 147-218. On June

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[4] No petition for a writ of certiorari was filed at that time to review the decision of the Supreme Court of Puerto Rico in that case. Plaintiffs in *U.S. Brewers* challenged the small brewer exemption simultaneously before the federal courts. *See, U.S. Brewers Ass'n, Inc. v. Pérez*, 592 F.2d 1212 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979) (rejecting the challenge on grounds of "sound equity practice and a concern for interests of federalism," in an effort to avoid the "awkward and heavy-handed remedy" of producing judicially a "broad taxing statute" not necessarily envisioned by legislation).

13, 2002, the petitioners here filed a complaint to challenge Act No. 69 of May 30, 2002, which amended the small brewer exemption established by Act No. 37.

The plaintiffs in 2002 included, among others, the distributors for Anheuser Busch (Budweiser, etc.), Miller (Miller Genuine Draft), Coors and Heineken, as well as Coors Brewing Company and Heineken Brouwerijen, N.V. Pet. App. 219-220. The 2002 complaint resulted in the judgment of the Supreme Court of Puerto Rico which petitioners now ask this Court to review.

On July 2, 2002, after an initial hearing before the trial court in Puerto Rico, one of the plaintiffs decided to shop for another forum. Although its distributor, V. Suárez & Company, Inc., Pet. App. 220-221, remained in the Puerto Rico case now under review, Coors nominally dropped out of that case and filed a separate action in the U.S. District Court for the District of Columbia. *Coors Brewing Co. v. Calderón*, 225 F. Supp. 2d 22 (D.D.C. 2002).

That sortie was not successful. *Id.* at 27. The District of Columbia federal court decided that "principles of federalism and equity cited by the First Circuit" in *U.S. Brewers*, 592 F.2d 1212, barred Coors' petition for a Temporary Restraining Order and Preliminary Injunction. *Id.* at 26-27; *see also*, n.2 herein. After a failed attempt at obtaining expedited review by the U.S. Court of Appeals for the D.C.

Circuit, 2002 WL 31519943 (C.A.D.C.) (not reported in F.3d), Coors voluntarily dismissed its appeal.

In November of 2006, and while the case now before the Court was pending in the Supreme Court of Puerto Rico, Coors went shopping again, this time filing an action in the U.S. District Court for the District of Puerto Rico, pursuant to 48 U.S.C. § 1983 and 28 U.S.C. § 2201, against one of respondents herein (Juan Carlos Méndez-Torres, in his official capacity of Secretary of the Treasury), again challenging Act No. 69 as being in violation of the Federal Relations Act and the dormant commerce clause. That case was dismissed by the U.S. District Court for the District of Puerto Rico on September 30, 2007. *See, Coors Brewing Co. v. Secretary of the Treasury*, Civil No. 06-2150 (DRD), Opinion and Order of September 30, 2007 (D.P.R. 2007). Its decision is currently pending review before the U.S. Court of Appeals for the First Circuit. *Coors Brewing Co. v. Secretary of the Treasury*, No. 07-2682.

Because the same issues raised by petitioners in the case now before the Court have been repeatedly heard and decided by federal and Puerto Rico courts over the last thirty years, and are even now being litigated by the same parties or their privies before a federal court of appeals, this is not a proper case for the issuance of a writ of certiorari.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition, and there is none. Respondents therefore respectfully request that the Petition be denied.

Respectfully submitted,

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86

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Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS, INC., ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

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TABLE OF CONTENTS

Page

1. The Federal Courts and the Puerto Rico Supreme Court Are In Conflict on a Constitutional Issue of National Importance.... 1

2. The Issue Is Squarely Presented, Particularly In Light of the Ongoing Resistance of the Puerto Rico Supreme Court 4

3. This Court Remains the Only Federal Forum in Which Petitioners' Constitutional and Federal Statutory Claims Can Be Heard 9

4. Respondents' Argument that the Petition Seeks an Advisory Opinion Is Misconceived and Groundless 11

5. The Importance of the Questions Warrant This Court's Review 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984) 6

Buscaglia v. Ballester, 162 F.2d 805 (1st Cir. 1947) 5

García v. Bauzá Salas, 686 F.Supp. 965 (D.P.R. 1988) 1

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) 7

Michigan v. Long, 463 U.S. 1032 (1983) 2

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 7

Starlight Sugar, Inc. v. Soto, 253 F.3d 137 (1st Cir. 2001) 1, 2

Trailer Marine Transp. Corp. v. Vazquez, 977 F.2d 1 (1st Cir. 1992) 5

U.S. Brewers Ass'n v. Perez, 455 F.Supp. 1159 (D.P.R. 1978) 9

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786 (2007) 7

PUERTO RICO CASES

Banco Popular de Puerto Rico v. Municipio de Mayaguez, 126 D.P.R. 653 (1990) 8

TABLE OF AUTHORITIES – Continued

Page

R.C.A. v. Gov't of the Capital, 91 D.P.R. 416 (P.R. 1964) 3, 4, 12

U.S. Brewers Ass'n v. Secretary of the Treasury, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980).....5, 6

1. The Federal Courts and the Puerto Rico Supreme Court Are In Conflict on a Constitutional Issue of National Importance.

The government of Puerto Rico does not dispute that the federal courts and the Puerto Rico Supreme Court are in direct conflict over whether the dormant Commerce Clause applies to Puerto Rico. Nor does Puerto Rico dispute that the federal courts have *expressly* acknowledged this conflict. Indeed, the federal courts have gone so far as to hold it futile to bring dormant Commerce Clause cases in the Puerto Rico courts precisely because the Puerto Rico Supreme Court holds the Clause inapplicable. *See, e.g.*, *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 144-45 (1st Cir.), *cert. denied,* 534 U.S. 1021 (2001); *García v. Bauzá Salas*, 686 F.Supp. 965, 967 (D.P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988)(holding Anti-Injunction Act barred District Court injunction). Similarly, Puerto Rico does not dispute that its courts have never held any statute or regulation of its government to violate the dormant Commerce Clause or the Federal Relations Act (FRA). Indeed, the government's brief *itself* refuses even to acknowledge that the Clause applies to Puerto Rico. Thus, as the general caselaw and the specific legislative history of Acts No. 69 and 108 demonstrate, Pet.Br. at 17-21, all three branches of the Puerto Rico government – the legislative, executive, and judicial branches, including the Puerto Rico Supreme Court – refuse to acknowledge that the dormant Commerce Clause applies to Puerto Rico.

An essential role of this Court is to ensure uniformity in federal law. The "important need for uniformity in federal law," *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), is particularly heightened when conflicts exist between federal and local courts over the meaning and application of the Constitution. Yet the Puerto Rico Supreme Court seeks to evade this Court's oversight and disable this Court from performing that essential role, on an issue clearly controversial within the Puerto Rico courts, by issuing a decision that refuses to provide any reasons for that court's decisions – even as that court refuses, in practice, to apply the dormant Commerce Clause at all.

That the Puerto Rico Supreme Court is willfully evading this Court's review is made clear by the history of the interaction between the federal and Puerto Rico courts over the dormant Commerce Clause. For many years, the federal courts of appeals have made clear that, unless the Puerto Rico Supreme Court clarifies otherwise, the federal courts will continue to understand that the Puerto Rico Supreme Court holds that the Clause does *not* apply in full to Puerto Rico. *See, e.g., Starlight Sugar*, 253 F.3d at 143. Yet in numerous cases, including this one, the Puerto Rico Supreme Court has refused to reject that understanding or even to address the issue, let alone to state its position clearly. As the First Circuit has held, "the *R.C.A.* case offers the only substantive statement on application of the Commerce Clause to Puerto Rico by the Puerto Rico

Supreme Court." *Id.* (describing *R.C.A. v. Government of the Capital*, 91 D.P.R. 416, 418 (P.R. 1964)). Furthermore, the First Circuit has recognized that *R.C.A.* holds, "at a minimum," that there can be "situations in which the Commerce Clause would not apply to Puerto Rico, even though it would constrain a State in comparable circumstances." *Id. See also* Pet.Br. at 21-25 (discussing *R.C.A.* case). The Puerto Rico Supreme Court has left that understanding in place. That court has said nothing, in this case or any other, to reject the federal courts' understanding that a profound conflict exists over whether the dormant Commerce Clause applies to Puerto Rico.

The two Puerto Rico justices who issued concurring opinions below reveal how dramatic the divide is within that court over whether the dormant Commerce Clause applies at all to Puerto Rico. The federal courts have directly acknowledged their direct conflict with the Puerto Rico Supreme Court on this issue. The dormant Commerce Clause claim was clearly presented to the Puerto Rico courts; indeed, it is a central basis of petitioners' complaint. *See* Pet. App. at 232-36. The Puerto Rico Supreme Court should not be permitted to evade this Court's review by cagily refusing to provide any reasons for its decision. This Court's review is the only way to ensure uniform interpretation and application of the dormant Commerce Clause to Puerto Rico.

2. The Issue Is Squarely Presented, Particularly In Light of the Ongoing Resistance of the Puerto Rico Supreme Court.

This case is one of the largest dormant Commerce Clause challenges to confront the Puerto Rico Supreme Court. Puerto Rico does not dispute that the local brewer has paid around $100 million less in taxes than if Puerto Rico had taxed local and off-island producers equally. Pet.Br. at 25. Two justices on the Puerto Rico Supreme Court wrote at length to dispute whether the Clause applies. The federal courts for many years have attempted to get the Puerto Rico Supreme Court to clarify whether it has changed direction, to announce whether it has decided to overrule *R.C.A.*, and to apply the dormant Commerce Clause. Yet the Puerto Rico Supreme Court in this case, as it has for two decades at least, refused to address the dormant Commerce Clause issue. In this context, if the Puerto Rico Supreme Court can reject dormant Commerce Clause claims without having to indicate whether the Clause applies to Puerto Rico and how, there is no reason that court will not continue to avoid this Court's review by similarly rejecting such claims without providing reasons in future cases.

Puerto Rico argues that at least the lower courts did address and reject the dormant Commerce Clause claims on the merits, even if the Puerto Rico Supreme Court continues to hold that the Clause does not apply at all to Puerto Rico. But this argument is flawed for four reasons.

First, the trial court expressly concluded that its own supreme court had resolved authoritatively that the dormant Commerce Clause does not apply to Puerto Rico. Pet. App. at 111. It would be unrealistic to conclude that that court's further discussion of the dormant Commerce Clause issue was not infected by its tainted starting point: that its own supreme court had concluded that the Clause did not apply in the first place.

Second, as Puerto Rico concedes, both lower courts concluded they were bound by a decision of the Puerto Rico Supreme Court nearly 30 years ago that addressed an earlier version of the differential beer taxation scheme. *See U.S. Brewers Ass'n v. Secretary of the Treasury,* 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980). Indeed, to the extent the lower courts addressed the merits of petitioners' claims, the entire foundation of that discussion was the conclusion that *U.S. Brewers* obligated the lower courts to reject petitioners' claims. But the federal courts did not establish that the dormant Commerce Clause applies to Puerto Rico until Judge Boudin's 1992 opinion in *Trailer Marine Transport Corp. v. Vazquez*, 977 F.2d 1 (1st Cir. 1992). Indeed, in so holding, the First Circuit had to overrule its own earlier precedents holding the dormant Commerce Clause inapplicable to Puerto Rico. *Id.* at 9, n.5 (overruling *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947)). Thus, *U.S. Brewers* was decided when neither the federal nor the Puerto Rico courts believed the dormant Commerce Clause applied to Puerto Rico.

Not surprisingly, no dormant Commerce Clause claims were raised in the *U.S. Brewers* case, and the court did not address the dormant Commerce Clause at all, let alone issue any holding as to whether earlier versions of the beer tax violated it. Respondent is thus completely inaccurate in representing that *U.S. Brewers* gave "due consideration" of "the dormant commerce clause." Opp.Br. at 6. It did not: *U.S. Brewers* applied a rational-basis test and nowhere addressed the dormant Commerce Clause. Moreover, petitioners are challenging *recent* enactments, Acts 69 and 108, not the law at issue nearly 30 years ago. That the lower courts would treat *U.S. Brewers* as controlling petitioners' dormant Commerce Clause challenges today illustrates just how cavalierly those courts treat dormant Commerce Clause claims.

Third, the trial and intermediate courts did little more than conclude that this case differs from *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, Hawaii had exempted from taxation by name two beverages produced only from Hawaiian plants. Here, Puerto Rico did not further its protectionist design by exempting locally-produced beer by brand name, but instead by volume of production. That distinction from *Bacchus* is, at most, a purely formal one. But regardless of *Bacchus'* direct bearing on the issues raised here, the lower courts gave short shrift to all of this Court's precedents that have held unconstitutional laws that are neutral on their face but nonetheless protectionist in purpose and effect.

See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786 (2007); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

Finally, the complaint in this case was dismissed at the pleading stage. Petitioners alleged that Acts 69 and 108 are protectionist in purpose, structure and effect. *See* Pet. App. at 225-39. Petitioners' offers of proof included testimony of an expert economist on the protectionist effects of these laws, detailed evidence of the legislative history, process, and general context in which Puerto Rico enacted these laws, and similar evidence. *See* Pet.Br. at 33. But the Puerto Rico courts dismissed the complaint without permitting any discovery, without holding any evidentiary hearing, and without otherwise examining the actual substance of the allegations. If the Puerto Rico courts are prepared to dismiss dormant Commerce Clause claims in this fashion, at the pleading stage, it is clear that they are not giving any meaningful effect to the Clause.[1]

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[1] Respondent also asserts, without any argument or discussion, that what it characterizes as "substantially similar" laws to those in Acts No. 69 and 108 exist on the mainland. Op.Br. at n.1. Petitioners disagree with that undocumented assertion: Puerto Rico's laws are specifically gerrymandered with the purpose and effect of protecting the one local, politically powerful beer producer. Because respondent provides no specific explanation or discussion of the ways in which it believes these other laws are "substantially similar," petitioner does not know

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At the very most, the lower courts in Puerto Rico might have given lip service to the dormant Commerce Clause. But in dismissing this complaint at the pleading stage, they made clear that the Clause has no effective meaning in Puerto Rico courts. Puerto Rico does not dispute that no court in Puerto Rico has ever held an action of the Puerto Rico government to violate the dormant Commerce Clause, although the federal courts, in contrast, have found numerous violations. This is hardly surprising, given that the Puerto Rico Supreme Court has authoritatively held, and has been widely perceived as having held, that the dormant Commerce Clause does not apply to Puerto Rico.[2]

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how to respond further to this vague assertion, except to note that any substantive consideration of these or other laws would have to await full briefing on the merits.

[2] Respondent mistakenly cites a 1990 Puerto Rico Supreme Court case as having been decided in 1998. *See* Opp.Br. at 5, n.3 (*citing Banco Popular de Puerto Rico v. Municipio de Mayaguez*, 126 D.P.R. 653). Respondent cites *Banco Popular* to suggest doubt about whether the Puerto Rico Supreme Court continues to reject the dormant Commerce Clause, but because that case was actually decided in 1990, it pre-dates the First Circuit's decision to hold the Clause applicable to Puerto Rico and pre-dates all the federal court cases that expressly recognize the conflict between the Puerto Rico courts and federal courts on this issue.

3. This Court Remains the Only Federal Forum in Which Petitioners' Constitutional and Federal Statutory Claims Can Be Heard.

Despite suggestions in respondents' brief, no federal court has ever addressed the merits of any dormant Commerce Clause challenge to Puerto Rico's nearly 30-year long protectionist beer-taxation scheme. For three decades, that scheme has massively distorted interstate competition in beer sales for the purpose of protecting Puerto Rico's one local producer. Because Puerto Rico's protectionist scheme is embodied in its tax code, however, the lower federal courts consistently have held that they lack jurisdiction over such challenges, due to the Butler Act and the Tax Injunction Act. *See* Pet.Br. at 33-37. The lower federal courts have been forced to decline jurisdiction even as the federal judges most knowledgeable about Puerto Rico have concluded that this beer-taxation scheme constitutes a "prima facie" violation of the FRA, at the least, because it purposefully discriminates against off-island producers. *U.S. Brewers Ass'n v. Perez*, 455 F.Supp. 1159, 1162 (D.P.R. 1978)(Toruella, J.), *rev'd on juris. grounds,* 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).

Respondents also try to obscure this Court's understanding of the issues presented here by devoting several pages to discussing separate litigation that the Coors Brewing Company has brought in the federal courts. Resp.Br. at 12-14. But that separate litigation only re-enforces the argument presented here. Coors is not a petitioner in this case. It chose

not to be part of the instant litigation and desperately sought a federal forum precisely because Coors concluded, as its federal filings state, that it would be "futile" to bring any dormant Commerce Clause challenge in the Puerto Rico courts – given that those courts refuse to recognize that the dormant Commerce Clause binds Puerto Rico at all. *See* Pet.Br. at 36. But just as the federal courts have concluded previously when dormant Commerce Clause and FRA challenges have been brought against protectionist provisions in Puerto Rico's tax code, the federal courts have refused jurisdiction over Coors' claims because the Butler Act and Tax-Injunction Act preclude original federal court jurisdiction. *Id.* at 34-37. Despite Puerto Rico's attempt to confuse the matter, the fact remains that this Court is the only federal court that can ever address the merits of petitioners' federal claims under the Constitution and the FRA. Only upon certiorari review of the decision of the Puerto Rico Supreme Court can any federal forum ever be made available for addressing petitioners' claims that the provisions at issue in Puerto Rico's tax code are protectionist in purpose and effect, and hence violate the dormant Commerce Clause – which must be understood and applied uniformly in the federal courts and the Puerto Rico courts – and the FRA.

4. Respondents' Argument that the Petition Seeks an Advisory Opinion Is Misconceived and Groundless.

The complaint in this case was dismissed at the pleading stage. Summary dismissal of a complaint which alleges that a Puerto Rico law is protectionist in purpose and effect is inconsistent with any plausible account of the content of the dormant Commerce Clause. The petition clearly states: "On the merits, the decision of the Puerto Rico courts to dismiss petitioners' dormant commerce clause and FRA claims at the pleading stage is wrong and should be reversed." Pet.Br. at 33.

There is nothing advisory about a decision of this Court holding that the dormant Commerce Clause applies, clarifying what faithful application of that Clause and the FRA require in the context of this challenge, and remanding for proper application of those standards. Indeed, that is precisely what this Court routinely does. Petitioners certainly would not object to this Court reaching the full merits and holding immediately that Acts No. 69 and 108 do, in fact, violate the Clause and the FRA. But because the lower courts summarily dismissed the complaint, the petition takes the appropriate step of asking that this Court clarify the application and meaning of the dormant Commerce Clause and FRA in the context of this challenge.

As noted above, the Puerto Rico Supreme Court refuses to recognize that the dormant Commerce

Clause applies to Puerto Rico. Even if the lower courts purported to assume that the Clause applies, their decision to dismiss the complaint summarily cannot be squared with any appropriate, faithful, or accepted understanding of the Clause. This Court's review is necessary to clarify that the Clause does apply to Puerto Rico in the same manner it applies to the States and to confirm that the Puerto Rico courts must give the Clause the actual legal effect this Court's precedents require. There is nothing advisory about that.

5. The Importance of the Questions Warrant This Court's Review.

Even to acknowledge that the Constitution limits the ability of Puerto Rico's government to regulate its economy without constraint is, obviously, a divisive and charged issue in Puerto Rico. Rather than address that question at all, the Puerto Rico Supreme Court uniformly rejects dormant Commerce Clause claims, often without giving any reasons, as in this case. It leaves intact its substantive ruling in the *R.C.A.* case – that the Clause does not apply – while refusing to address the fact that that ruling has been in conflict with that of the federal courts since 1992. When the pressures of local politics stand in the way of faithfully acknowledging and implementing the national Constitution, this Court's intervention is especially vital.

This Court has acted many times to clarify the legal relationship of Puerto Rico and the United States. *See* Pet.Br. at 25-30 (citing cases). Few questions are as important to that legal relationship as whether the dormant Commerce Clause and FRA prevent Puerto Rico from enacting economically protectionist legislation that discriminates in favor of local producers and against mainland and foreign competitors. Mere uncertainty about that question would justify this Court's review. But far more than mere uncertainty is involved here: as the federal courts have stated in numerous cases, there is a direct conflict between the federal courts and the Puerto Rico Supreme Court over whether the dormant Commerce Clause applies at all to Puerto Rico. Resolution of that fundamental question surely warrants this Court's review.

Respectfully submitted,

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